CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM ~~1923~~ 1924

No. ~~504~~ 194

C. V. BROWNE, PETITIONER

vs.

THE UNION PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR CERTIORARI FILED OCTOBER 8, 1923

CERTIORARI GRANTED NOVEMBER 26, 1923

(28,904)

(29,904)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 594

C. V. BROWNE, PETITIONER,

vs.

THE UNION PACIFIC RAILROAD COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

INDEX

	Original	Print
Proceedings in supreme court of Kansas	1	1
Caption	1	1
Record from district court of Shawnee County	2	1
Notice of appeal	2	1
Journal entry of judgment	3	1
Clerk's certificate	4	2
Appellant's abstract of record	6	3
Petition	6	3
Notations as to Exhibits A and B to petition	15	8
Exhibit C to Petition—Letter, Browne Grain Co. to Gladney Milling Co., March 18, 1921	16	9
Answer	16	9
Motion to strike	20	12
Demurrer to answer	20	12
Journal entry of judgment (omitted in printing)	21	12

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1923

	Original	Print
Notice of appeal.....(omitted in printing)..	22	13
Certificate of counsel.....	22	13
Specifications of error.....	23	13
Appellee's counter abstract of record.....	26	13
Plaintiff's Exhibit A—Letter, Ed Past Grain Co. to Browne Grain Co., October 18, 1920.....	26	13
Plaintiff's Exhibit B—Letter, Gladney Milling Co. to Browne Grain Co., October 30, 1920.....	28	14
Argument and submission.....	31	15
Judgment	33	15
Opinion, Dawson, J.....	35	16
Dissenting opinion, Harvey, J.....	40	20
Petition for rehearing.....	43	20
Order overruling petition for rehearing.....	51	26
Clerk's certificate.....	52	26
Order granting certiorari.....	53	27

[fol. 1] IN THE

SUPREME COURT OF THE STATE OF KANSAS

No. 24605

C. V. BROWNE, Appellant,

vs.

THE UNION PACIFIC RAILROAD COMPANY, Appellee

Be it remembered, that on the 26th day of August, 1922 there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Notice of Appeal and Transcript of the Journal Entry of Judgment, of the District Court of Shawnee County, Kansas, in the words and figures as follows, to-wit:

[fol. 2] IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

[Title omitted]

NOTICE OF APPEAL—Filed Aug. 14, 1922

To the Union Pacific Railroad Company and to Blair & Lillard, its attorneys of record, and to the Clerk of the above entitled court:

You and each of you will herewith take notice that C. V. Browne plaintiff herein, appeals to the Supreme Court of the State of Kansas from the orders herein made on July 15th 1922, overruling plaintiff's motion to strike certain parts from defendant's answer and overruling plaintiff's demurrer to defendant's answer and to certain parts thereof and rendering judgment against plaintiff and in favor of defendant for costs.

Campbell & Campbell, Attorneys for Plaintiff.

Service of the foregoing notice acknowledged as made on us this 14th day of August, 1922.

R. W. Blair, T. M. Lillard, O. B. Eidson, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 3] IN DISTRICT COURT OF SHAWNEE COUNTY

JOURNAL ENTRY OF JUDGMENT

And now on this 3rd day of July, 1922, the regular term day of this court, this matter comes regularly on for hearing upon the motion of plaintiff to strike parts from defendant's answer and upon

the demurrer of plaintiff to defendant's answer, plaintiff being present by Campbell & Campbell, his attorneys and defendant being present by R. W. Blair and O. B. Eidson, its attorneys.

After oral argument the court takes said matter under consideration, And now on this 15th day of July, 1922, the court finds that said motion of plaintiff should be overruled, and that said demurrer of plaintiff should be overruled.

Whereupon, plaintiff announces that he will stand on his demurrer to defendant's answer. Whereupon upon motion of defendant the court finds that defendant should have judgment for its costs herein.

It is now therefore, ordered, adjudged and decreed, that the motion of the plaintiff to strike certain parts from defendant's answer should be and the same is hereby overruled and, plaintiff having elected to stand on his said demurrer, that defendant should have and it is hereby given judgment against the plaintiff for the costs of this action.

O. K. Campbell & Campbell, Attorneys for plaintiff. O. K. R. W. Blair, T. M. Lillard, O. B. Eidson, Attorneys for defendant.

[fols. 4 & 5] STATE OF KANSAS,
Shawnee County, ss:

CLERK'S CERTIFICATE

I, W. E. Anderson, Clerk of the District Court within and for the County and State aforesaid, do hereby certify that the above and foregoing is a full, true and correct copy of Notice of Appeal Filed August, 14, 1922 Acknowledgement of service of Notice of Appeal, Journal Entry of Trial and Judgment, in case No. 34902, C. V. Browne vs. The Union Pacific Railroad Company, in the above entitled cause, as the same appears on file and of record in my office.

Witness my hand and seal of said court, hereunto affixed at my office in the city of Topeka, this 25th day of August, 1922.

W. E. Anderson, Clerk.

[File endorsement omitted.]

[fol. 6] IN THE SUPREME COURT OF KANSAS

No. 24605

[Title omitted]

APPEAL FROM DISTRICT COURT OF SHAWNEE COUNTY

Hon. George H. Whitcomb, Judge

ABSTRACT OF APPELLANT—Filed April 14, 1923

Plaintiff's petition filed on April 7, 1922, as amended, is as follows:

PETITION—Filed April 7, 1922

Plaintiff for cause of action against defendant, alleges:

1. That he is a resident of McKinney, Texas, where at all times hereinafter mentioned he has been engaged in the wholesale grain business and in the purchase and sale of wheat in car lots under the name and style of The Browne Grain Company.

That defendant is a corporation and a common carrier engaged in the business of operating a railroad and of transporting merchandise [fol. 7] for hire in and through Shawnee County, Kansas and between Kansas and other states.

That at all times hereinafter mentioned the Ed Past Grain Company was engaged in the wholesale business at Denver, Colorado, and The Gladney Milling was engaged in the grain and milling business at Sherman, Texas.

2. That on October 18, 1920, plaintiff purchased of the Ed Past Grain Company of Denver, Colorado, through the Kansas City Brokerage Company, 10,000 bushels of No. 2 soft white wheat at $2.36 per bushel basis delivered Group I Texas, Government scale of discounts for lower grades, time of shipment fifteen days or by November 2, 1920, billing instructions to follow, said wheat to be settled for on destination weights and official grades. Copy of his purchase contract with Ed Past Grain Company is hereto attached as Exhibit "A." That thereafter plaintiff requested said Ed Past Grain Company to bill said wheat to Whitewright, Texas, c/o Union Pacific Railroad Company, c/o Missouri, Kansas & Texas Railroad Company at Junction City, Kansas, and plaintiff extended time of shipment of said wheat under such purchase to November 9, 1920.

That on October 30, 1920, plaintiff sold to The Gladney Milling Company of Sherman, Texas, 5,000 bushels of said No. 2 white wheat at $2.40 per bushel basis delivered Group I Texas, Sherman official weights and grade to govern settlement, shipment to be made in ten days or by November 9, 1920, said wheat to be billed to Sherman, Texas. Copy of his sale contract to Gladney Milling Company is hereto attached as Exhibit "B."

[fol. 8] 3. That according to the usage and custom of the grain business, well known to defendant, and to the Ed Past Grain Com-

pany and to the Gladney Milling Company, time of shipment of grain in car lots is determined by the date appearing on the bills of lading on which the carrier received such car of grain for transportation and grain on contract is delivered by tendering a properly endorsed order bill of lading attached to the seller's draft on the buyer for the estimated price of such car of grain, such order bill of lading being delivered to the buyer upon payment of such draft.

4. That thereafter there was presented to plaintiff by a bank at McKinney, Texas, four sight drafts drawn by Ed Past Grain Company to which were attached order bills of lading properly endorsed showing shipment by the Ed Past Grain Company and receipt by defendant of four cars of wheat, billed to Whiteright, Texas, notify Browne Grain Company, which bills of lading showed shipment of said wheat in accordance with the terms of plaintiff's said contract of purchase from the Ed Past Grain Company, and of his said contract of sale to The Gladney Milling Company.

That relying upon the representations and recitations contained in said bills of lading issued by defendant, plaintiff paid said sight drafts drawn by the Ed Past Grain Company and came into possession of said bills of lading issued by defendant.

That said four bills of lading were signed by F. B. Choate, assistant general freight agent of defendant company, the scope of whose authority included the issuing of bills of lading for defendant for transportation in interstate commerce.

[fol. 9] The drafts to which said bills of lading were attached and paid by plaintiff were for the estimated amount due the Ed Past Grain Company for each of said cars of wheat, the freight charges on each car of wheat from point of origin to group I Texas being deducted from the price of such wheat at $2.36 per bushel basis group I, Texas and the drafts drawn for the difference, such freight charges to be paid at destination. Said drafts were based on the amount of wheat in each car as shown by such bills of lading and were as follows:

Car GN	#17527 81,000 pounds.....	draft for $2,650.00
Car CP	#72066 61,000 pounds.....	draft for 2,000.00
Car MC	#62632 81,000 pounds.....	draft for 2,650.00
Car WAB	#75411 81,000 pounds.....	draft for 2,650.00

304,000 # or 5066 2/3 bu.

Total drafts $9,950.00

That plaintiff would not have paid said drafts and taken up said order bills of lading had said order bills not shown that each of said cars were shipped by November 9, 1920.

5. That upon receipt of said order bills of lading, plaintiff immediately tendered said wheat to the Gladney Milling Company to apply on his said contract of sale to it, drawing sight drafts on said milling company for the estimated sale price of said four cars of wheat less freight charges, to which drafts were attached said order bills of

lading. That said Gladney Milling Company refused to pay said drafts, or to accept said four cars of wheat on its said contract of purchase from plaintiff, contending that said order bills were incorrectly dated and that said four cars of wheat were not shipped as represented in said order bills, or by November 9, 1920, and that they were not [fol. 10] applicable on said contract, said milling company being ready, willing and able to accept and pay for said four cars of wheat on said contract if shown that said four cars of wheat were in fact shipped as indicated by said order bills, or by November 9, 1920.

That plaintiff used every effort to ascertain whether the recitations in said order bills were correct and whether said four cars of wheat had been shipped as indicated by said order bills, or by November 9, 1920, but was unable to so ascertain; defendant and its different agents refusing to furnish plaintiff with the necessary and pertinent information.

Whereupon plaintiff being unable to apply said cars of wheat on said contract, sold same to the Gladney Milling Company at a price of $1.72½ per bushel, basis delivered Group I, Texas, or basis Sherman, Texas, which was the then reasonable market value of such wheat, a loss to plaintiff of 67½c. a bushel. That said sale to the Gladney Milling Company was made on the 18th day of March, 1918 over the telephone and was confirmed in writing by plaintiff, a copy of said letter of confirmation being hereto attached, marked Exhibit "C" and made a part hereof.

6. That in truth and in fact the recitations contained in said order bills and relied on by plaintiff were not true, said four cars of wheat not being shipped on the dates stated in said order bills by defendant.

Each of said order bills showed receipt of the numbered car by defendant from Ed Past Grain Company, consigned to order of Ed Past Grain Company, destination Whitewright, Texas, notify Browne Grain Company at Whitewright, Texas. Route, care M. K. & T. at Junction City, Kansas, and each was signed Ed Past Grain Co., ship- [fol. 11] per, per Otis, and by F. B. Choate, A. G. F. A., Agent, per R. G. A. The erroneous statements in said order bills were as follows:

Car GN #17527. Received "at Peavey, Idaho, 10/25/20." "Stop at Denver for Federal inspection. Issued at Denver, Colo. in lieu of B/L issued at Peavey, Idaho 10/25/20 Destn. unchanged." The fact was, and said order bill should have shown that it was issued at Denver, Colorado, November 22, 1920 in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

Car CP #72066. Received "at Buhl, Idaho, 11/5/20." "Stop Denver for Fed. Inspection. Issued at Denver, Colo., in lieu of B/L issued at Buhl, Idaho, Destination unchanged." The fact was, and said order bill should have shown that it was issued at Denver, Colorado, November 24, 1920, in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

Car MC #62632. Received "at Buhl, Idaho, 11/5/20." "Stop at Denver for Federal Inspection. Issued at Denver, Colo. in lieu

of B/L issued at Buhl, Idaho, Destn. unchanged." The fact was, and said order bill should have shown that it was issued at Denver, Colorado, November 24, 1920, in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

Car WAB #75411. Received "at Buhl, Idaho 11/2/20." "Stop at Denver for Federal Inspection. Issued at Denver, Colorado in lieu of B/L issued at Buhl, Idaho 11/2/20 Destination unchanged." The fact was, and said order bill should have shown that it was is-
[fol. 12] sued at Denver, Colorado, November 22, 1920, in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

That said original order bills were surrendered by plaintiff to the delivering carrier at destination and are now in defendant's, not plaintiff's possession, nor are any duplicate copies of said order bills, and plaintiff herewith demands that said original order bills be produced in court by defendant at the trial of this action, else the contents of said order bills will have to be established by secondary evidence.

7. That while plaintiff was endeavoring to apply said four cars of wheat on his contract of sale to the Gladney Milling Company and thereafter to sell said four cars of wheat, demurrage accrued on said four cars at Sherman, Texas, through no fault of plaintiff, totaling $607.00, which demurrage plaintiff found it necessary to and did pay. That plaintiff also paid the freight charges on said cars of wheat from point of origin to Sherman, Texas, or Group I, Texas, in the total amount of $1,651.16.

That the wheat contained in said four cars was No. 2 soft white wheat and was applicable on plaintiff's said contract of sale.

[fol. 13] That the amount of wheat in each of said cars, at destination, Sherman, Texas, being the amount delivered by the carrier upon the surrender at destination of said order bills; the amount of demurrage paid on each car by plaintiff; the freight paid on each car by plaintiff; the amount plaintiff would have received for each of said cars, if they had been shipped as stated in said order bills; the amount plaintiff actually received on his resale of said wheat; and the loss to plaintiff on each car, were as follows:

Car	Bushels	Demurrage	Freight	Contract	Sale	Loss
GN #17527	1,347	$143.00	$432.87	$3,232.80	$2,323.57	$1,052.23
CP #72066	1,011–1/3	149.00	325.00	2,427.20	1,744.55	830.65
MC #62632	1,344–1/3	158.00	460.63	3,226.40	2,318.98	1,065.42
WAB #75411	1,346–1/3	158.00	432.66	3,231.20	2,322.42	1,066.78
	5,049	$607.00	$1,651.16	$12,117.60	$8,709.25	$4,015.08

[fol. 14] 8. That plaintiff actually paid out for said wheat, including drafts, $9,950.00, freight, $1,651.16, and demurrage, $607.00, the total sum of $1,208.16. That if said order bills had been corrected and if said cars had been shipped as therein indicated, he would have received for said wheat from the Gladney Milling Company the gross sum of $2.40 a bushel, basis delivered Group I, Texas, or $12.117.60, out of which would have been deducted the freight charges of $1,651.16, or a net sum of $10,466.44. That by reason of the fact that said four cars of wheat were not shipped as indicated in said order bills, or by November 9, 1920, plaintiff found it necessary to and did sell said wheat on the open market for the then reasonable market value of $8,709.52 basis delivered Group I, Texas, and had to pay the freight charges of $1,651.16, and demurrage of $607.00 accrued through no fault of his, receiving a net sum therefor of $6,451.36, or $4,015.08 less than he should have received therefor, to his damage in said amount, which damage was suffered January 1, 1921.

9. That after plaintiff paid said drafts drawn on him by the Ed Past Grain Company, and took up the order bills thereto attached, all in reliance on the recitations therein contained, and before plaintiff learned the true facts concerning the recitations in said order bills contained and concerning the dates of shipment of said cars, said Ed Past, conducting said Ed Past Grain Company, became insolvent and a fugitive from justice, which situation still exists. That immediately upon learning the facts concerning said order bills, and within thirty days thereafter, plaintiff made written demand upon defendant for the payment of the damages suffered by him as aforesaid, which demand was refused.

[fol. 15] 10. That said damage to plaintiff was caused by the fault of defendant in issuing said incorrect order bills of lading which were negotiated to plaintiff for value and which were relied on by plaintiff, he having no knowledge that the recitations therein contained were not true, when he became the lawful holder thereof.

Wherefore, plaintiff prays for judgment against defendant in the sum of $4,015.08, plus 6% interest on said sum from January 1, 1921 to date of judgment herein, and for the costs of this action.

EXHIBIT "A" TO PETITION

Written confirmation of sale dated October 18, 1920 and signed by the Ed Past Grain Company at Denver, Colorado confirming sale to the Browne Grain Company of McKinney, Texas of 10,000 bushels No. 2 soft white wheat, old government scale discounts for lower grades at a price of $2.36 per bushel basis delivered Group I Texas, destination weights official grades "Time of Shipment—fifteen days."

EXHIBIT "B" TO PETITION

Confirmation of purchase signed by the Gladney Milling Company at Sherman, Texas dated October 30, 1920 confirming purchase from The Browne Grain Company of McKinney, Texas of 5,000 bushels No. 2 white wheat at $2.40 per bushel delivered Texas Group 1, Sherman Official Grades and Weights "shipments within ten days" to be billed to Sherman.

Exhibit "C" letter dated March 18, 1921, Browne Grain Company to Gladney Milling Company at Sherman, Texas, as follows:

[fol. 16] EXHIBIT "C" TO PETITION

Referring to our 'phone conversation, we are making draft on you, warehouse receipts and other necessary papers attached for the white wheat, $1.72½ delivered Group #1, we to pay no storage and no unloading charge.

It is also understood that in case it is shown up by Mr. Past that this wheat was not unloaded or transited enroute and that it moved in contract time that you will allow us the invoice price, $2.40 per bushel, as per your letter of January 8th.

Thank you.

To the plaintiff's petition as amended, defendant filed the following:

IN DISTRICT COURT OF SHAWNEE

ANSWER

1. Now comes Union Pacific Railroad Company defendant above named and for its answer to the petition and amendment thereto filed by the plaintiff herein, denies each and every, all and singular, the allegations therein contained, except such as are hereinafter specifically admitted.

2. Defendant admits that plaintiff purchased wheat from The Ed Past Grain Company on the basis of the contract set out as Exhibit A to the amendment to plaintiff's petition and that plaintiff extended the time of said contract to date of November 9, 1920; but defendant alleges that under the terms of said contract, the plaintiff having failed to specifically notify The Ed Past Grain Company that the said contract was cancelled, was bound by the terms thereof to accept said shipments of wheat when they arrived at McKinney, Texas, regardless of the dates of the bills of lading or the dates said [fol. 17] shipments of grain were consigned from their point of origin.

3. Defendant further answering, admits that the plaintiff contracted to sell the wheat in question to The Gladney Milling Company of Sherman, Texas, under the terms of the contract, as shown by Exhibit "B" attached to plaintiff's amendment to this petition, but this answering defendant alleges that no notice was at any time given to the defendant herein by anyone, of the purposes for which said shipments were being made nor was it ever advised of the terms of any contracts to be fulfilled upon the arrival of said shipments at destination, which contracts are now claimed by the plaintiff to have been in existence at the time, as shown by these Exhibits A and B. Defendant alleges further that it had no knowledge of any kind, and did not by any custom or usage know, that the shipments were to be applied in fulfillment of the terms of any such contracts or that reliance was being placed upon the dates of the bills of lading as determining the rights of the consignors of said shipments, the party specified in said bills of lading to be notified, and some unknown third party thereunder.

4. Further answering, defendant admits that plaintiff acquired possession of the order bills of lading covering the shipments in question, which were signed by an agent of the defendant company at Denver, Colorado; but defendant alleges that said bills of lading were prepared by the Ed Past Grain Company, consignor of said shipments and plaintiff's assignor; that all of the blanks in the forms of the bills of lading, which are customarily furnished by carrier companies to shippers, were filled out by the said Ed Past Grain [fol. 18] Company and the same were presented to the defendant's agent for his signature in the rush of business. That the defendant's agents, relying upon the good faith of the plaintiff's assignor in preparing said bills of lading, signed the same and his signature was in this manner directly and solely procured by the fraud of the Ed Past Grain Company. Defendant further alleges that if there were any false statements in said bills of lading contained, they were placed therein and made by the fraud of the plaintiff's said assignor, and that it was without the scope of the authority of defendant's agent to sign bills of lading containing any false or erroneous statements. Defendant further alleges that said bills of lading describe the shipments in question accurately and stated the weight thereof correctly, and that said shipments were carried through to destination promptly and were fully and safely delivered to the plaintiff herein or to his order upon surrender to the destination carrier of said bills of lading.

5. Defendant denies specifically that plaintiff used every effort to ascertain the dates said shipments were made, and this defendant alleges that the freight bills which plaintiff alleges were paid by him, show fully the points where different parts of said shipments originated in less than carload lots, and show the transit point where the same were consolidated into the four carload shipments involved in this action; that had plaintiff awaited the arrival of said shipments at McKinney, Texas, before paying the drafts attached to the bills of lading he could, by inquiring of the delivering carrier, having

ascertain all of the facts relative to the dates and points of origin of said shipments, and defendant alleges this information was equally [fol. 19] available to him at any time hereafter. Defendant further alleges that by reason of the lateness of the delivery of said shipments, plaintiff was, or should have been warned, of the probability of the fraud of the Ed Past Grain Company, and should have detected the same prior to the payment of the drafts and acceptance of the wheat, as did The Gladney Milling Company when the wheat was thereafter tendered to them for application on the contract between them and the plaintiff.

6. Defendant further alleges that said shipments of wheat arrived at Sherman, Texas, on December 2, 3rd, 6th and 7th, 1920, respectively. That as alleged in plaintiff's petition, The Gladney Milling Company immediately refused to accept the same upon its contract of purchase; that the plaintiff knowing this, permitted said wheat to remain in the cars at Sherman, Texas, until January 14th, 1921, when three of the cars were unloaded, and January 17th, 1921, when the fourth car was unloaded, thereby incurring demurrage charges totaling $607.00; that at the time stated, said shipments were unloaded by The Gladney Milling Company and the same were stored in their elevator for the account of the plaintiff, where the same remained until March 19, 1921, when the plaintiff sold the wheat to The Gladney Milling Company on the basis of the then market price, which was down and rapidly dropping lower. Defendant further alleges that during the time said wheat remained in the cars at Sherman, Texas, the market value of No. 2 soft white wheat remained up, and that on several occasions the wheat in question could have been sold on the market by the plaintiff at a price equal to, and often in excess of the contract price agreed upon between the plaintiff and The Gladney Milling Company, but that regardless of [fol. 20] this, said wheat was not sold until March 19, 1921. Defendant further alleges that any loss sustained by the plaintiff growing out of the shipments of wheat in question was not proximately occasioned by any failure of the defendant company, and that any such loss was directly and proximately caused, by the fraud of the Ed Past Grain Company and by the failure of the plaintiff to use proper and reasonable care in the premises, in that he failed to notify the Ed Past Grain Company of the cancellation of their contract; received said wheat at a late date without making any effort to ascertain if the shipments were made within the contract limitations, and that he failed to use any degree of diligence in keeping the damages down to a minimum after the wheat in question had been refused by the Gladney Milling Company.

To this answer plaintiff filed the following:

IN DISTRICT COURT OF SHAWNEE COUNTY

MOTION TO STRIKE

Comes now the plaintiff herein and moves the court to strike from the answer of defendant filed herein as surplusage, redundant and immaterial the following parts thereof:

1. All that part of paragraph 3 of said answer commencing with the words, "but this answering defendant," in the fourth thereof and extending to the end of said paragraph.

2. All of paragraph IV of said answer.

3. All of paragraph V of said answer.

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and also filed the following

DEMURRER TO ANSWER

Comes now the plaintiff and demurs to the answer of defendant [fol.21] filed herein for the reason that same fails to state facts sufficient to constitute a defense to plaintiff's cause of action as set out in his petition.

Plaintiff demurs specially to the third paragraph of the answer of defendant filed herein for the reason that same fails to state any facts constituting a defense to plaintiff's cause of action as set out in his petition.

Plaintiff demurs specially to the fourth paragraph of defendant's answer filed herein for the reason that same fails to state facts sufficient to constitute any defense to plaintiff's cause of action as set out in his petition.

Plaintiff demurs specially to the fifth paragraph of defendant's answer filed herein for the reason that same fails to state facts sufficient to constitute any defense to plaintiff's cause of action as set out in his petition.

Plaintiff's motion and demurrer were overruled as shown by the following:

IN DISTRICT COURT OF SHAWNEE COUNTY

JOURNAL ENTRY OF JUDGMENT—Omitted; printed side page 3

[fol. 22] Thereafter plaintiff filed the following:

IN DISTRICT COURT OF SHAWNEE COUNTY

NOTICE OF APPEAL—Omitted; printed side page 2

CERTIFICATE

We certify that the foregoing is a true and correct abstract of the pleadings and proceedings herein.

Campbell & Campbell, Wichita, Kansas, Attorneys for Appellant.

[fols. 23–25 IN DISTRICT COURT OF SHAWNEE COUNTY

SPECIFICATIONS OF ERROR

The trial court erred:

In overruling plaintiff's motion to strike portions of defendant's answer.

In overruling plaintiff's demurrer to defendant's answer, and portions thereof.

In rendering judgment in favor of defendant and against the plaintiff.

[fol. 26] IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 24605

[Title omitted]

Counter Abstract—Filed May 8, 1923

As a counter abstract, appellee submits plaintiff's Exhibits "A" and "B," in full, to supplement the showing made on page 10 of appellant's abstract:

EXHIBIT "A" TO PETITION

No. 1282

Ed Past Grain Company

Denver, Colo., October 18, 1920.

The Browne Grain Company, McKinney, Texas:

We confirm sale to you today thru Kansas City Brokerage Co. Quantity-Care-10,000 bushels-Grain No. 2 soft white wheat-Old gov-

[fol. 27] ernment scale discounts lower grades, Price $2.36 per bushel. Basis del. group One Texas. Time of shipment-fifteen days. Billing-Rush billing instructions. Destination weights, official grades.

Payment by demand draft with documents attached upon presentation.

It shall be the duty of the buyer to furnish shipping directions immediately or upon request of the seller, and if the buyer fails to furnish directions, in accordance with this agreement, the seller reserves the right, without further notice to the buyer, to cancel the contract charging loss, if any, to the buyer, or to sell same for the buyer's account. Grain not shipped within specified time, contract will be considered open until shipped, unless we have been advised the same has been cancelled.

Shipping terms are defined as follows:

Immediate shipment shall mean within three calendar days at place of shipment.

Prompt shipment shall mean within ten calendar days at place of shipment.

Five days' shipment shall mean within five calendar days at place of shipment, etc.

Excluding the date of sale, time of shipment shall be figured from date full shipping directions are received at Denver.

If any feature of this contract is not in accordance with your understanding, or is not agreed to, wire us immediately on receipt of this confirmation.

Manifest errors excepted.

Ed Past Grain Company, Per —— Past.

[fol. 28] EXHIBIT B TO PETITION

No. 1047

Gladney Milling Company

Sherman, Texas, October 30, 1920.

Browne Grain Co., McKinney, Texas:

We confirm purchase from you by Mr. Gladney today of 5,000 bu. No. 2 white wheat at $2.40 per bushel delivered Texas group one Sherman official grades and weights shipments within ten days. Lower grades to be applied at the following discounts: No. 3 to apply at 3c. discount. Nothing under No. 3 to apply. Bill as follows: Sherman:

It is also understood and agreed that this confirmation is a part of the contract and that if the grain mentioned above is not shipped within the specified time, we reserve the right, at our option, to

cancel, extend time or buy in for seller's account, and that this contract is not performed until weights and grades mentioned above are obtained.

No grade to be accepted if we consider it unmerchantable.

We reserve the right to change the destination of grain in transit.

Draw on us (Without exchange) through the Merchants & Planters National Bank at Sherman, Texas, with Bills of Lading attached to draft leave margin to protect weights and grades.

"Shippers' Order" Bills of Lading must be endorsed.

Gladney Milling Company, By J. L. James."

[fols. 29 & 30] The above and foregoing is a true and correct counter abstract of the Exhibits in the above entitled case.

T. M. Lillard, Bruce Hurd, O. B. Eidson, Attorneys for Appellee.

[fols. 31 & 32] IN THE SUPREME COURT OF THE STATE OF KANSAS

Topeka, Tuesday, May 8th, 1923.

[Title omitted]

ARGUMENT AND SUBMISSION—Filed May 8, 1923

This cause comes on to be heard on the appeal papers and abstracts of the record from the district court of Shawnee County, Div. No. 2; and thereupon after oral argument by Ray Campbell for the appellant and by O. B. Eidson for the appellee said cause is submitted on briefs of counsel for both parties, and taken under advisement by the court. It is further ordered that the appellant be given until Monday the 14th day of May in which to file reply brief herein.

[fols. 33 & 34] IN THE SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

JUDGMENT—Filed June 9, 1923

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $— and hereof let execution issue.

Dawson, J., delivered the opinion of the court, Burch, J., Mason, J., & Marshall, J., concurring, Harvey J. Hopkins, J., and Johnston, C. J., dissenting.

[fol. 35] IN SUPREME COURT OF KANSAS

[Title omitted]

Appeal from Shawnee County, Second Division

Affirmed

OPINION—Filed Sat., June 9, 1923

Syllabus by the Court

Dawson, J.

1. The dating of an interstate shipper's order bill of lading is not part of the description of the goods mentioned therein, and the federal act of June 5, 1916, (Ch. 415, 39 Stat. L. 538) has not changed the rule announced in Atchison & Topeka Ry. v. Harold, 241 U. S. 371, 60 L. ed. 1050, touching an innocent holder's right of action against the issuing carrier for misdating such order bill.

2. Other matters pleaded in defense considered, and held not subject to demurrer.

Burch, J., Mason, J., Marshall, J., concurring.
Harvey, J., Hopkins, J., and Johnston, C. J., dissenting.

A true copy. Attest: —— ——, Clerk Supreme Court.

[fol. 36] The opinion of the court was delivered by

DAWSON, J.:

The plaintiff brought this action for damages sustained through his reliance on erroneous datings on four shipper's order bills of lading issued by defendant.

The plaintiff, a grain dealer of McKinney, Texas, alleged that on October 18, 1920, he bought 10,000 bushels of wheat from the Ed Past Grain Company of Denver, Colorado, at $2.36 per bushel, to be shipped on or before November 2, 1920, but the time was extended until November 9, 1920. Plaintiff gave the grain company instructions to ship the wheat to Whitewater, Texas, via defendant's railway and another. Separate shipper's order bills of lading for each of four cars of this wheat was issued at Denver by the defendant railroad company. On October 30, 1920, plaintiff sold 5,000 bushels of this wheat to The Gladney Milling Company of Sherman, Texas, shipment to be made by November 9, 1920, and billed to Sherman. The Ed Past Grain Company presented to plaintiff four sight drafts with the four shipper's order bills of lading attached each of which recited receipt of a carload of wheat by defendant. Plaintiff paid these drafts and received the bills of lading. He alleged that he relied on the recitals in the bills of lading, which had been signed by

defendant's agent, and that he would not have paid the drafts and would not have taken up the bills of lading had they not shown that the cars were shipped by November 9, 1920. Plaintiff then tendered the four bills of lading to the Gladney Milling Company pursuant to his sale of 5,000 bushels of wheat to that company, but the latter refused to accept them and refused to accept the four cars of wheat, on the ground that the bills of lading were incorrectly dated and that the wheat had not been shipped as represented thereon, or by November 9, 1920, and were therefore inapplicable on plaintiff's contract of sale with the Gladney Milling Company. Consequently plaintiff had to sell the wheat at a loss, by which he sustained damages. The alleged inaccuracies in the bills of lading were—

[fol. 37] On B/L for Car G. N. #17527, it was recited:

"Received at Peavey, Idaho, 10/25/20. Stop at Denver for Federal inspection. Issued at Denver, Colo. in lieu of B/L issued at Peavey, Idaho 10/25/20 Destn. unchanged."

Plaintiff alleged that this order bill should have shown that it was issued at Denver, Colorado, November 22, 1920 in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

On B/L for C. P. #72066, it was recited:

"Received at Buhl, Idaho, 11/5/20. Stop Denver for Fed. Inspection. Issued at Denver, Colo. in lieu of B/L issued at Buhl, Idaho. Destination unchanged."

Plaintiff alleged that this order bill should have shown that it was issued at Denver, Colorado, November 24, 1920, in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

On B/L for M. C. #62632, it was recited:

"Received at Buhl, Idaho, 11/5/20. Stop at Denver for Federal Inspection. Issued at Denver, Colo. in lieu of B/L issued at Buhl, Idaho, Destn. unchanged."

Plaintiff alleged that this order should have shown that it was issued at Denver, Colorado, November 24, 1920, in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

On B/L for W. A. B. #75411, it was recited:

"Received at Buhl, Idaho, 11/2/20. Sto- at Denver for Federal Inspection. Issued at Denver, Colorado in lieu of B/L issued at Buhl, Idaho, 11/2/20. Destination unchanged."

Plaintiff alleged that his order bills should have shown that it was issued at Denver, Colorado, November 22, 1920, in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

Plaintiff also alleged that before he learned that the datings on the bills of lading were incorrect and that the shipments had not been made at the times therein recited, Ed Past, trading as the Ed Past [fol. 38] Grain Company, became insolvent and was and is a fugitive from justice, and—

"That said damage to plaintiff was caused by the fault of defendant in issuing said incorrect order bills of lading which were negotiated to plaintiff for value and which were relied on by plaintiff, he having no knowledge that the recitations therein contained were not true, when he became the lawful holder thereof."

The defendant answered, admitting plaintiff's contracts of purchase and sale, but alleging, in substance,—

Second. That under the terms of his contract with plaintiff the Past Company was bound to accept the shipments regardless of dating of bills of lading.

Third. That defendant, at that time its Denver agent signed the bills of lading, had no knowledge of any contract between plaintiff and the Past Company, or between plaintiff and the Gladney Milling Company either specific or by reason of custom or usage, and that it did not and could not know that any special reliance would be placed by anyone on the dating of the bills of lading.

Fourth. That if the Denver bills of lading were misdated this was done by the Past Grain Company who prepared the forms, presenting them to the carrier for signature only; that it was without the scope of authority of defendant's agent to bind the company by signing bills of lading containing any false statements; that such bills described the shipments accurately, stated the weight thereof correctly, and that the shipments were carried through to destination promptly and were fully delivered to the order of plaintiff at destination.

Fifth. That had plaintiff awaited the arrival of the shipments at destination before taking up the drafts he would have been fully informed of the original points of origin of the shipments in Idaho and the dating of the Oregon, Utah, bills by notations on the statements for freight charges which would have been presented to him for payment in usual course. That in any event the plaintiff should have been warned of the probability of misdating of the Denver bills by reason of the late arrival of the bills of lading and shipments.

[fol. 39] Plaintiff moved to strike out the most of the matters in defendant's answer summarized above. The motion was overruled. Plaintiff then filed a general demurrer and a special demurrer to the third, fourth and fifth paragraphs of the answer. These demurrers were overruled and plaintiff appeals, contending that these shipper's order bills of lading having to do with interstate commerce are strictly negotiable.

Since the decision of the United States Supreme Court, June 5, 1916, in Atchison & Topeka Ry. v. Harold, 241 U. S. 371, 61 L. ed. 1050, reversing our own decision, Harold v. Railway Co., 93 Kan. 456, 144 Pac. 823, it is too clear for comment that these interstate bills of lading under consideration are exclusively governed by federal law, and the Kansas law touching responsibilities arising from

their issue is inapplicable. At the time the Harold case was decided, interstate shipper's order bills of lading were not negotiable instruments. Following that decision the Congress on August 29, 1916, enacted chapter 415, 39 Statutes at Large, 538, (Fed. Stat. Ann.—1918, Supp. 72 U. S. Comp. Stat. 1916, §8604 aaa et seq.) This act relates to bills of lading in interstate and foreign commerce. Plaintiff contends that the text and effect of this act is to make shipper's order bills of lading unqualified negotiable instruments. The act does not specifically so declare, although it does clothe them with certain attributes of negotiable instruments—"within the meaning of this act." (§3.) No specific language in the act can be construed to impose liability on the carrier for an erroneous dating of an order bill of lading. Plaintiff argues that such liability is imposed by section 22 which provides that where a carrier has issued an order bill it shall be liable thereon to the holder thereof who has given value therefor in good faith "relying upon the description of the goods, for damages caused by * * * their failure to correspond with the description thereof in the bill at the time of its issue." It would be an undue extension of the statutory words "description of the goods" to say that the date of shipment of the goods as shown by the bill of lading is part of the description. A description of a car-load of goods is a statement or recital of their character, of their sort, kind or species. Thus, a carload of shelled corn, ear corn, yellow corn, or white corn. If the corn was in the [fol. 40] ear and the bill of lading said it was shelled, or if the bill said it was white when in fact it was yellow, or if it was in fact a carload of oats or barley, there would be a misdescription for which the carrier would be liable in damages to a person who had paid for the corn in reliance on the description in the bill of lading. But since Congress specifically defined the matters as to which the carrier issuing an order bill of lading would be liable, the liability goes no further. Expressio unius est alterius exclusio.

A careful reading of the federal state discloses no language which by fair intendment can be said to impose a liability on the carrier in favor of an innocent transferee of an order bill, for inaccurate or incomplete dating thereof; so the rule announced by the federal supreme court in the Harold case touching a holder's right of action against a carrier for the misdating of an order bill of lading necessarily is still the law. It follows that insofar as plaintiff's demurrer involved the question chiefly urged here, the ruling of the trial court was correct.

The other matters pleaded in defendant's answer, to which the plaintiff objected and demurred, need but brief attention. The fact, if correct, that plaintiff was bound to accept the shipments from the Ed Past Grain Company, may not be a complete defense to plaintiff's cause of action, but it does raise an issue which may become important on the measure of damages if any are recoverable in the action. And whether there was a custom of grain dealers to rely on the datings of bills of lading, of which the carrier had notice or was bound to take notice, was also a question of fact, and therefore not demurrable. The scope of the powers of defendant's agent at Den-

ver could not be determined by demurrer; and neither could the matters pleaded in the fifth paragraph of the answer summarized above.

The judgment is affirmed.

Burch, J., Mason, J., Marshall, J., concurring.

IN SUPREME COURT OF KANSAS

DISSENTING OPINION

HARVEY, J. (dissenting): The principal object in the passage of the Federal Bill of Lading Act, Chapter 415, 39 Statute at large, 538, was to make order bills of lading strictly negotiable. At the time of the passage of this act it was estimated that more than $5,000,000,000.00 in order bills of lading were handled annually by [fols. 41 & 42] banks and commercial houses and much loss had been sustained by reason of them not being strictly negotiable and various defenses arising in connection with their risk. (Report No. 847, 64th Congress, 1st session, House of Representatives; Report No. 149, 64th Congress, 1st session, Senate.) The date and place of origin of a shipment may be a part of the description of the merchandise and is, in fact, sometimes a vital part of it. In fact, no other good reason suggests itself for placing the date and place of origin on the bill of lading except to form part of the description of the merchandise.

Hopkins, J., joins in this dissent.
Johnston, C. J., dissents.

[fol. 43] IN THE SUPREME COURT OF KANSAS

[Title omitted]

PETITION FOR REHEARING—Filed June 27, 1923

Appellant petitions this Court for rehearing herein and represents:

That on June 9, 1923 this Court affirmed the decision of the District Court of Shawnee County, Kansas, which overruled Plaintiff's Demurrer to that part of Defendant's Answer which attempt to explain the circumstances under which misdated bills of lading were issued by it.

In its opinion this Court holds that except as otherwise provided by the Federal Bill of Lading Act of 1916, The Federal Rule is that shipper's order bills of lading are not strictly negotiable and that a carrier is not liable to a purchaser for value of such an order bill

for damages resulting from the misdating thereof. We admit this premise under the authority of A. T. & S. F. Rly. Co. v. Harold 241 U. S. 371.

This Court further holds that the Pomerene Act does clothe order bills with certain attributes of negotiable instruments, within the meaning of said Act but does not specifically impose liability on a carrier for erroneous dating of an order bill, and that as the act "specifically defined the matters as to which the carrier issuing an order bill of lading would be liable, the liability goes no further, Expressio Unius Est Alerius Exclusio."

And then this Court further holds that the only liability of the carrier under the Pomerene Act is that imposed by Section 22 thereof which provides that it shall be liable to an innocent purchaser of an order bill "relying upon the description therein of the goods for damages caused by * * * their failure to correspond with the description thereof in the bill at the time of its issue."

Holding that the only liability of the carrier herein is that imposed by the above quoted part of Section 22, this Court further holds that "It would be an undue extension of the statutory words, [fol. 44] 'description of the goods' to say that the date of shipment of the goods as shown by the bill of lading is part of the description. A description of a car load of goods is a statement or recital of their character, of their sort, kind or species."

We admit that in its opinion herein this court squarely decided the issues raised but we contend that it misconstrued the meaning of the statutory words "description of the goods" and we ask a rehearing that this phase of the question have further consideration.

The majority decision of this Court was dissented from by the Chief Justice, the senior member of this Court and by Justices Harvey and Hopkins, the two junior members.

Three or four justices of this court were wrong. Which?

It seems very strange that Congress should pass a Federal Bill of Lading Act of forty-five sections, unquestionably intended for the protection of the innocent purchasers of order bills of lading, the net result of which Act is to make carriers liable to such purchasers only for non-receipt of all or part of the goods described in the bill and for a mis-statement of the sort, kind of species of goods described in such order bill. Did any member of this Court ever hear of an instance of a carrier issuing an order bill for a car of oats when it was in fact a car of wheat; or for a car of horses when it was in fact a car of hogs? We never did. And as to describing a car of white corn as yellow corn; or a car of soft wheat as hard wheat; this court must know that no carrier includes such details in its bills of lading. Presumably the recommenations of the American Bar Association, the various committee hearings had in Congress and the arguments therein relative to the necessity of the Federal Bill of Lading Act were premised on some actual condition which needed remedying. Unquestionably one of such conditions was the issuance by carriers of order bills acknowledging receipt of a certain amount of grain or other commodities when in fact a lesser amount or none at all was received. Why should Congress concern itself to

make carriers liable for issuing an order bill for a car load of giraffes when in fact it received a car load of elephants. Why delve into the realm of conjecture to find improbably instances where a carrier might be liable for a misdescription in an order bill when there are multitudinous instances in our commercial activities of [fol. 45] misdescriptions in order bills which might and do result in damages to the innocent purchasers thereof.

As suggested by Justice Harvey in his dissenting opinion, why place the date and place of origin of shipment in an order bill except to form a part of the description of the merchandise?

This Court by its opinion delimits a description of goods to a recital of their physical characteristics such as white or yellow, shelled or on the ear. Under this rule the description of a girl would be limited to her physical characteristics, such as blonde or brunette, tall or short, and the date and place of her origin or birth which might indicate her age or nationality, or her disposition or temperament would comprise no part of her description. And every one know- that the mere recital of physical characteristics of a girl constitutes the smallest part — her correct description.

We know of no previous judicial determination of what constitutes the description of goods in an order bill. The construction of Section 22 of the Pomerene Bill must then be based on the intent of Congress in enacting the Bill, and upon the usual and customary meaning of common English words. And we challenge Appellee to find a single case of claimed liability of a carrier resulting from an incorrect statement or recital of the character, sort, kind or species of goods covered by an order bill. So why should it be presumed that the quoted part of Section 22 was intended by Congress to apply to an unknown contingency? But a damage resulting from the misdating of an order bill was not an unknown or unthought of contingency, for the Federal Supreme Court, but a few months earlier, had been called upon to consider liability of a carrier under exactly such a state of facts.

Is it not reasonable to presume that Congress, in making a carrier liable for a misdescription of goods in an order bill, had in contemplation such a misdescription as might occur, to the damage of the purchaser of such order bill, there being reported cases involving such misdescription, and not some misdescription that never had occurred and probably never would occur?

Giving Congress the benefit of the doubt, it presumably, before passing the Pomerene Act, considered all phases of loss or damage [fol. 46] *that* and unheard of possibility of damage resulting from describing a gondola of coal as a car load of pianos?

Furthermore, the goods described are the goods comprising a shipment, not goods exhibited at a county fair. So Congress, in legislating relative to the description of goods in an order bill, must have had in contemplation such description as might have been pertinent in consideration of the relationship between carrier and consignee. And taking into consideration that Section 22 refers to shipments of goods, and that the only pertinent description of such goods in an order bill would describe them in relation to their ship-

ment, surely the description of the date and place of shipment comprises a part of the description of the goods shipped.

Or suppose that a bank was asked to loan money on an order bill covering shipment of perishable goods, such as fruit, vegetables or eggs. It would hardly do so unless the order bill showed shipment very recently. No banker would take up an order bill for a car of eggs if same showed shipment several months previously. To act intelligently he would have to rely on the date appearing in the order bill. And certainly the date of shipment of a car of eggs would be highly descriptive of the eggs themselves.

A Wichita grain dealer recently tried to discount his draft, with an order bill of a car of wheat attached, at a local bank. The banker of course inspected the recitations on the lading before advancing money thereon, and learned therefrom that the car had been shipped from a nearby town to Wichita some three months before. This of course meant that the car had been in Wichita nearly three months and that about $500.00 demurrage had accrued thereon with the result that the car of wheat was then worth $500.00 less than the ordinary market value. This instance surely indicates that the date on an order bill is very material in commercial transactions, and is relied upon by purchasers and bankers. And to the extent that the date indicated the value of the wheat, by showing accrued demurrage, it was absolutely descriptive thereof.

Another thought. Not one time in forty does an agent signing a bill of lading have personal knowledge of the weight or color of grain covered thereby. The prepared order bill is taken to his office by the shipper and signed by the agent in reliance on the shipper's honesty. But the date of signing such an order bill is necessarily known to the agent, presuming that he knows how to read a calender. [fol. 47] Or in the instant might occur to those who bought and paid for order bills in the usual course of commerce and sought thereby to facilitate and expedite trade and commerce by making order bills negotiable and by making carriers liable in certain known contingencies. Undoubtedly the over-billing of car lot shipments in order bills, to the damage of innocent purchasers thereof, was one of the most usual contingencies that arose in commercial transactions, as evidenced by the amount of reported litigation arising therefrom, so Congress specifically made carriers liable for the non-receipt of the goods described in an order bill, regardless of whether the agent executing such order bill had authority so to do, if he was acting within the scope of his apparent authority. But if this was the only contingency contemplated by Congress in enacting Section 22, as insisted by Appellee in its brief and argument before this Court, why was that part of Section 22 included which makes carriers liable when the goods covered by an order bill fails to correspond with the description thereof in such bill?

Is it not reasonable to assume that Congress, by making carriers liable for a misdescription, intended thereby to cover all incorrect statements in an order bill, other than over-billing, which might result in damages to an innocent purchaser thereof?

We at this time have pending a claim against a carrier which issued an order bill reciting "freight prepaid," which order bill our client paid for in reliance on such recitation. The freight was not prepaid, and had to be paid at destination to our client's damage in the amount thereof. By this court's interpretation of Section 22, as such mis-statement was not as to the color, weight or consistency of the goods shipped, or their character, sort, kind of species, the carrier would not be liable, and it would be a good defense for the carrier to plead that its agent had no authority to execute such an order bill. In purchasing such order bill our client relied on the various recitations thereof, the date, weight, and statement that freight was prepaid, as well as upon the recital that the car contained wheat, considering that all such recitals were a part of the description of the goods shipped.

Is it not reasonable to presume that Congress had in contemplation such a known and rather frequent damage resulting from an untrue statement in an order bill, in referring to misdescriptions, [fol. 48] rather than the unknown case the original ladings were surrendered by Ed Past to Appellee's agent at Denver who signed the exchange ladings in question, the statements therein as to dates being taken from such original ladings. The agent did not have to rely on anyone, in showing the dates of original shipments in the exchange ladings, but merely had to read such dates from the original ladings then before him.

Is it reasonable to assume that Congress intended by the Pomerene Act to make a carrier liable for mis-statements in an order bill as to weight, texture or shape of goods shipped, of which its agent had no personal knowledge, and not to make it liable for mis-statements of facts absolutely within the agent's knowledge, which statements would be relied upon by a purchaser?

In Leigh Ellis v. Davis, 67 L. Ed. Adv. Sheet of Feb. 15, 1923, the United States Supreme Court affirms the Fifth Circuit Court of Appeals, (276 Fed. 400) which affirmed the U. S. District Court of Georgia (274 Fed. 443) in dismissing a petition of a purchaser of an order bill who claimed damages because of reliance on the bill of lading weight. While it was held that the goods shipped (bales of cotton) were package freight and that the bill of lading weight was mere surplusage, as the number of bales was correctly given, under Section 20 of the Pomerene Act, the Federal Supreme Court also holds that the action was barred because not brought within two years and a day, in compliance with the Bill of lading provision that:

"Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property."

It was contended that this provision applied only to loss or damage to the property shipped and did not cover the statutory liability arising from misrecitals in the order bill. But the Supreme Court held that the claim of statutory liability "is of the kind that the clause, 'suits for loss, damage, or delay' manifestly intended to limit, and

we see no reason why it should not be included under the head of loss."

One might reasonably assume that in fixing the limitation at a certain time from the delivery of the property, the loss referred to would be of the property itself. Yet the Supreme Court says that such loss also includes the statutory liability for over-billing. We [fols. 49 & 50] cite this decision as indicative of the Supreme Court attitude as to a strict interpretation of English words. And surely the date of shipment of goods is such a part of the description thereof as was manifestly intended to be included in the statutory liability of a carrier imposed by Section 22 of the Pomerene Act.

We think that the majority of this Court in its opinion placed entirely too limited and too literal a construction on the phrase "relying upon the description therein of the goods" when it held that such description was intended only to refer to their sort, kind or species. As said by Justice Reynolds of the concept "property"—

"The accurate delimitation of the concept 'description' would afford a theme especially opposite for amplificative philosophic disquisition."

When this Court, with undue scrupolonsoty, limited the description of goods to a recital of their character or kind, it becomes evident that, we, in our original presentation of this case, had not sufficiently attracted consideration to all phases of the question to the evident intent and purpose of Congress and to the evils sought to be remedied by Section 22 of the Pomerene Act.

And to the end that this matter may be more thoroughly presented and that this Court may give to the interpretation of the words of *the words of* Section 22 the consideration they merit, Appellant earnestly petitions for a rehearing herein.

Respectfully Submitted, Campbell & Campbell, Attorneys for Appellant.

[Endorsed:] 8, 41. 24605. Browne v. U. P. R. R. Davison, J. Petition for rehearing.

[fol. 51] IN THE SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

ORDER OVERRULING PETITION FOR REHEARING—Filed July 10, 1923

Now comes on for decision the petition for a rehearing of this cause, and thereupon it is ordered that said petition for a rehearing be overruled.

[fol. 52] IN THE SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

CLERK'S CERTIFICATE

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings had in the above entitled case, and also of the opinion of the court rendered thereon, as the same appear on file and remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Topeka, this 4th day of September A. D. 1923.

D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. [Seal Supreme Court, State of Kansas.]

[fol. 53] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 594

[Title omitted]

ORDER GRANTING CERTIORARI—Filed Nov. 26, 1923

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Kansas, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

November 26, 1923.

IN THE

Supreme Court of the United States.

C. V. BROWNE, PETITIONER,

VS.

THE UNION PACIFIC RAILROAD COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

Petitioner prays this court for a writ of certiorari to review a final decision of the Supreme Court of the State of Kansas which affirmed a judgment, based on the pleadings, against him for costs and in favor of the railroad company.

Petitioner, plaintiff in the trial court, sued to recover damages alleged to have been sustained by him as a result of paying value in good faith for four Interstate Order Bills of Lading covering four cars of wheat sought to be applied on a contract of sale to him, in reliance on the recitations therein contained, as to the dates when such shipments originated. He alleged that he bought such wheat under a contract which provided that it was to be shipped from point of origin by November 9, 1920 and that he sold it on the same terms; that the bills of lading tendered to him by his vendor were executed by defendant's agent and showed shipment within contract time; that he paid the drafts to which

said order bills were attached in reliance on such dates; that such dates were erroneous, the shipments not having originated prior to November 9th as stated therein; that by reason of such mis-dating he was unable to apply said four cars of wheat on his contract of sale, to his damage.

Defendant, the railroad company in its answer, admitted that plaintiff took up the four mis-dated bills of lading as alleged and that they were signed by its agent at Denver, Colorado, but alleged, among other things, that such order bills were in fact prepared by the consignor on blanks furnished by it and that its agent signed same in the rush of business, relying on the good faith of the consignor, and that said agent's signature was procured by fraud of the consignor and it was without the scope of the authority of said agent to sign bills of lading containing false or erroneous statements.

Plaintiff demurred to the foregoing part of defendant's answer on the theory that bills of lading were negotiable under the provisions of the Federal Uniform Bill of Lading Act of 1916, and hence that any inquiry into the circumstances under which the order bills originated was precluded. Said demurrer was overruled and plaintiff electing to stand thereon, judgment was rendered against him for costs and he appealed to the Supreme Court of Kansas. In its final decision the Supreme Court of Kansas affirmed the trial court, holding that that portion of defendant's answer demurred to did constitute a defense as the Federal Uniform Bill of Lading Act, known as the Pomerene Act, did not make

interstate order bills of lading strictly negotiable; that as Section 22 of said act specifically defines the matters as to which a carrier issuing an order bill is liable, such liability goes no further; that while said Section 22 makes a carrier issuing an order bill liable thereon to the holder thereof who has given value therefor in good faith "relying upon the description * * * of the goods, for damages caused by * * * their failure to correspond with the description thereof in the bill at the time of its issue," the date of shipment of the goods as shown by the order bill is no part of the description. "A description of a car load of goods is a statement or recital of their character, of their sort, kind or species."

Prior to the passage of the Pomerene Act on August 29, 1916, this court by a long line of decisions uniformly held, under the Federal common law rule, that an interstate shipper's order bill of lading was not negotiable, being merely a contract for the performance of a certain duty by the carrier issuing it, all inquiry into the transaction in which it originated not being precluded, the doctrine of *bona fides* of purchases only applying in a limited sense (*Shaw* v. *Bank*, 101 U. S. 557; *Pollard* v. *Vinton*, 105 U. S. 7) that a carrier was not bound by untrue recitals in such an order bill, the agent signing same acting beyond the scope of his authority (*St. Louis I. M. & S. Rly. Co.* v. *Knight*, 122 U. S. 79; *Friedlander* v. *T. P. Rly. Co.*, 130 U. S. 416; *The Carlos F. Roses*, 177 U. S. 655); and that a carrier was not liable to an innocent purchaser thereof for damages re-

sulting from a mis-dated order bill (*A. T. & S. F. Rly. Co.* v. *Harold*, 241 U. S. 371).

But the Pomerene Act specifically makes order bills negotiable, providing in detail for their negotiation and applying the doctrine of *bona fides* of purchasers in almost every section. Section 22 being:

> (22) "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of those actual or apparent authority includes * * * the issuing of bills of lading * * * the carrier shall be liable to. * * * (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof, in the bill at time of its issue."

The Federal questions involved in the instant case, and which we think should be definitely determined by this court are: The extent to which the Pomerene Act has changed the old common law rule as to the negotiability of order bills; what explanation may be made by a carrier of the circumstances surrounding the issuance by it of order bills which are negotiated to purchasers for value; and whether Section 22 of the Pomerene Act limits the reliance which a purchaser of an order bill can place upon "the description therein of the goods" to a statement or recital in such an order bill of the character, sort, kind or species of such goods.

Billions of dollars annually are paid for, or advanced on, order bills in reliance on the recitals thereof and in the belief that one to whom such an order bill is

negotiated is protected to the same extent as the purchaser of ordinary commercial or negotiable paper. The Pomerene Act of forty-five sections was enacted with the very evident and patent purpose of giving to order bills the broad degree of negotiability possessed by other commercial paper. And Section 22 thereof specifically makes carriers liable for non-receipt of the goods described in an order bill and for a mis-description therein of the goods. The first liability mentioned was no doubt meant to cover the numerous instances, many of which are reported, where a lading, though fraud with or upon an agent, might be issued and negotiated without receipt of the goods or where they were over-billed, and the other liability, for mis-description, was surely meant to cover all other damages to an innocent purchaser resulting from untrue recitals in an order bill, such as mis-dating.

The Carmack Amendment had long made carriers liable to holders of order bills for loss, injury or damage to the *property* received for interstate transportation. Section 22 of the Pomerene Act pertains to damages resulting in the *negotiation of* order bills. As the increased use of bills of lading as commercial paper made necessary the enactment of a Uniform Federal Bill of Lading Act, and as a grave and important question has been raised in this case as to the liability of carriers under such act for damages resulting from the negotiation of order bills containing untrue statements of certain facts, a writ of certiorari should be issued herein to the

end that such question may be reviewed by this court and finally determined by it.

Petitioner therefore respectfully prays that a writ of certiorari be issued herein to review the final decision of the Supreme Court of Kansas so that the question may be presented to and determined by this court whether order bills are in fact strictly negotiable under the Pomerene Act and whether the description of goods in an order bill, under section twenty-two of such act, refers solely to a statement of their character, sort, kind or species.

Respectfully submitted,

RAY CAMPBELL,
Wichita, Kansas.
Attorney for Petitioner.
J. GRAHAM CAMPBELL,
Wichita, Kansas.
Of Counsel.

BRIEF OF PETITIONER.

Surely the intent of the Uniform Federal Bill of Lading Act of 1916 was to give to order bills such a degree of negotiability as would protect purchasers thereof who relied upon the recitations therein contained. Prior to the passage of that act the question of the rights of such purchasers was repeatedly before this court. The very purpose of the act was to change the Federal rule as theretofor held by this court and to give to order bills the usual attributes of commercial paper. Order bills are playing an increasingly important part in the commerce of our country. Their negotiation not only facilitates commerce but the prompt movement of our crops and products would be almost impossible without it.

The grain trade well illustrates the extent and necessity of such negotiation. The country elevator operator can finance his business with small capital for as soon as he has purchased enough grain to fill a car he can at once realize thereon by drawing his sight draft with bill of lading attached which he cashes at his local bank, which relies on all the recitations contained in such order bill. The wholesale dealer takes up such sight draft in reliance on such recitals and immediately realizes thereon by drawing out on the mill or the exporter, which draft is paid in reliance on the order bill thereto attached.

As alleged by petitioner in his pleadings in the trial court time is the essence of all grain contracts which are universally based on a date of shipment, not date of delivery. And such date of shipment is determined by the date in the order bill furnished by the seller, which date is inserted by the carrier. Literally hundreds of millions of dollars are paid out annually in the State of Kansas alone in reliance on the dates appearing in order bills covering grain shipments. Also reliance is frequently placed on the point of origin as stated in an order bill, or upon recitals as to whether freight has been prepaid. These items of information are placed in an order bill by the carrier issuing same. Why? Order bills, by their very nature, are meant to be negotiated. If such recitals have no function to perform in such negotiation, why are they inserted by the carriers?

The Washburn Crosby Milling Company of Minneapolis may buy 100,000 bushels of wheat from a Kansas dealer, at a price basis delivered Minneapolis, same to originate in a certain part of Kansas where the wheat has a particularly high protein content, and to be shipped in September, billed via Kansas City for Federal inspection. Such wheat is tendered by the seller in car lots by drafts drawn for the sale price to which are attached properly endorsed order bills. Before paying for each car of wheat so tendered the mill carefully inspects the order bill attached to each draft to ascertain therefrom whether it was shipped within contract time, and from the proper point of origin, whether it was properly billed and whether it bore the notation by the

carrier "freight prepaid." And reliance is placed on every one of such recitations contained in the order bill. Yet if the majority decision of the Kansas Supreme Court herein is correct all of such recitations might be untrue without making the carrier liable for damages resulting from mis-placed reliance thereon, as none of them comprises a part of the "description" of the wheat.

The Pomerene Act clearly makes a carrier liable for non-receipt of all or part of the goods "described" in an order bill, yet ordinarily the agent issuing an order bill has no personal knowledge of the actual number of pounds of grain or other commodity received in a certain car. But the agent necessarily knows the *date* when he issues such order bill. Or in case of an exchange lading, as in the instant case, the original order bill is surrendered to and is before him when he signs the exchange lading, and he has merely to *copy* correctly the date appearing therein.

It is very necessary that grain and other dealers know as speedily as possible whether, under the Pomerene Act, they can rely on recitals in order bills other than as to the character, sort or species of goods shipped. The instant case was brought squarely under the Pomerene Act and while the specific point involved was as to liability of a carrier for damages resulting from a mis-dated order bill, yet the decision of the Kansas Supreme Court is farther reaching than that, as it attempts to limit the "description" of goods in an order bill, as covered by section twenty two of the act, to a recital of their physical attributes. Just as though

a description of a girl would be complete without some data as to the date of her origin!

We believe the only decision of this court interpreting the Pomerene Act is *Pere Marguette Rly. Co.* v. *French,* 254 U. S. 538. Therein was involved the liability of a carrier for delivering a car of goods without requiring surrender of the order bill. In the opinion it is said:

> "Prior to the enactment of the Pomere Act, bills of lading were not negotiable instruments and one who did not have valid title to the goods could not by transfer of the bill of lading give a good title to a *bona fide* holder."
>
> "When, in the interests of commerce, the Federal Uniform Bill of Lading Act extended to bills of lading certain characteristics of negotiable paper in order to protect the *bona fide* purchaser of such bills, it was deemed proper to afford also certain protection to the carriers."
>
> "The purchaser whom the act protects is he who is entitled to assume that the carrier has not delivered the goods and will not thereafter deliver them except to a person who holds the bill of lading. The purposes of sections 10, 11, and 12 is to give bills of lading *attributes of commercial paper.*"

If, in the interests of commerce, the Pomerene Act was enacted for the purpose of giving to order bills the attributes of commercial paper and to protect *bona fide* purchasers thereof, then surely such a purchaser who relies on the date thereof, or other data descriptive of the *shipment,* is entitled to the same protection as a purchaser who relies on the weight, color, or kind of *goods* as recited in such an order bill.

We think that the interpretation placed upon the provisions of the Pomerene Act by the Kansas Supreme Court herein is wrong, and that if is allowed to stand untold confusion will result in commercial circles. In the interests of commerce this court should definitely and finally construe the provisions of the act that are in question herein. And to that end a writ of certiorari should issue herein to review the decision of the Supreme Court of Kansas.

Respectfully submitted,

RAY CAMPBELL,
Attorney for Petitioner.

J. GRAHAM CAMPBELL,
Of Counsel.

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No. 194.

Supreme Court of the United States

OCTOBER TERM, 1924.

C. V. BROWNE, PETITIONER,

VS.

THE UNION PACIFIC RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF PETITIONER.

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INDEX.

Statement 1

Specifications of Error 6

Argument 7

Conclusion 35

CITATIONS.

American Hyde & L. Co. vs. So. Ry. Co., (Ill.) 142 N. E. 200 29

A. T. & S. F. Ry. Co. vs. Harold, 241 U. S. 371....7, 27

Friedlander vs. T. & P. Ry. Co., 130 U. S. 416.....7, 9, 13, 24

In Matters of Bills of Lading, 52 I. C. C. 671.... 28

Leigh Ellis vs. Payne, (Ga.) 274 Fed. 443..... 30

N. Y. P. R. S. S. Co. vs. Lumber Co., (I. C. C. A.) 284 Fed. 513 29

Pomerene Act (39 Stat. at L. Ch. 415 p. 538)....7, 35

Pioneer Trust Co. vs. Ry. Co., (Mo.) 224 S. W. 109 28

Pollard vs. Vinton, 105 U. S. 7.....7, 9, 13

Pere Marquett Ry. Co. vs. French, 254 U. S. 538 30

Rainbolt vs. Sampson, 259 Fed. 564..... 29

St. L. I. M. & S. Ry. Co. vs. Knight, 122 U. S. 79 7, 9

Shaw vs. North Pa. R. Co., 101 U. S. 557..... 7, 8

Saugerties Bank vs. Del. & H. Co., (N. Y.) 141 N. E. 904 20

Shaw Co. vs. Cole, (Tex.) 236 S. W. 178..... 28

The Carlos F. Roses, 177 U. S. 655.....7, 10, 13

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STATEMENT.

This matter is before this court on writ of certiorari to the Supreme Court of the State of Kansas, to review its decision affirming the judgment of the District Court of Shawnee County, Kansas, overruling the demurrer of C. V. Browne, plaintiff, to parts of the answer of the Union Pacific Railroad Company, Defendant.

As shown by the petition of Browne in the trial court (Tr. 3), the facts briefly, are:

In October, 1920, Browne, a grain dealer of McKinney, Texas, bought four cars of white wheat (raised in Utah) from Ed Past, a grain dealer of Denver, Col-

orado, same to be shipped from point of origin by November 9th and sold the wheat to the Gladney Mill of Sherman, Texas for the same shipment. Time is the essence of all grain contracts and date of shipment is determined from the date appearing in the bill of lading, all as was well known to the Union Pacific as well as to the contracting parties. Wheat shipped from point of origin by November 9th was applicable on Browne's contract of purchase from Past and upon his contract of sale to the Gladney Mill; that shipped later was not. Past applied on his sale to Browne four cars of wheat which had ben shipped from Utah to Denver, diverting them on to Texas. He surrendered the original order bills which showed shipment of the four cars from Ogden, Utah, on *November 19th* to the Union Pacific agent at Denver, the scope of whose apparent authority included the issuance of such order bills and said agent executed and delivered to Past four "in lieu" or "exchange" order bills showing billing to Texas and also stating on the faces thereof that they were issued in lieu of original order bills issued at Idaho points *prior to November 9th* In other words, the exchange order bills were not correct, mis-stating the dates of original shipment.

Past took these misdated exchange order bills, endorsed them and attached to his sight drafts on Browne for the sale prices of the four cars of wheat, all pursuant to the usual method of tendering car lots of grain on sale contracts. Browne, in reliance on the recitations in the order bills, which showed original shipment of the four cars of wheat, within contract time, paid Past's drafts

upon presentation and thus became the owner and holder in good faith and for value of such four order bills.

Browne then sought to apply the four cars on his sale to the Gladney Mill, drawing his sight drafts on the Mill with said order bills attached. For some reason the Mill became suspicious of the actual dates of shipments and refused to rely on the recitations contained in the order bills as to shipping dates and refused to accept the four cars of wheat on its purchase from Browne until shown that they were actually shipped prior to November 9th as recited in said order bills.

Browne made every effort to ascertain the true dates of origin of said four cars of wheat but was refused information by the carriers and as Past had become insolvent and a fugitive from justice, he was unable to convince the Gladney Mill that the four cars were in fact shipped prior to November 9th and was forced to sell the wheat on the open market at the then low market price. While seeking information relative to the correctness of the order bills, $607.00 demurrage accrued on the four cars which Browne had to pay. Browne paid out a total of $11,601.16 for said four cars all in reliance on the correctness of the dates appearing in said order bills. Had the order bills been correct, he would have received $12,117.60 for the four cars but as a result of the misdating he received but $8,102.52 therefor. Browne then brought suit in the District Court of Shawnee County, Kansas against the Union Pacific Railroad Company to recover the loss which he sustained by reason of his reliance on such misdated order bills.

In its answer to his action (Tr. 9) the Union Pacific admitted Browne's contracts of purchase and sale as alleged but contended in the following numbered paragraphs of said answer:

3. That it had no notice or knowledge of such contracts or that the recitations of the order bills issued by it might be relied on.

4. That said exchange order bills were prepared by Ed Past, consignor, on forms furnished by it, all blanks therein being filled out by Ed Past, who presented such exchange order bills to its agent for his signature, who relied upon the good faith of Past in preparing such exchange order bills and signed same, his signature being procured by the fraud of Ed Past; it being without the scope of the authority of its said agent to sign bills of lading containing any false or erroneous statements.

5. That Browne should have awaited the arrival of the cars before paying Past's sight drafs, when the freight bills might have shown the true shipping dates or he should have surmised that the ladings might have been misdated.

Browne attacked such parts of the answer by motion and by demurrer (Tr. 12) on the theory that he purchased the order bills as negotiable instruments and hence that such paragraphs of the answer, particularly No. 4, would constitute no defense.

The trial court overruled both motion and demurrer (Tr. 1) and Browne, electing to stand on his demurrer, judgment was rendered against him (Tr. 1) and he ap-

pealed to the Supreme Court of Kansas.

Browne's contention has always been that the Federal Bill of Lading Act of 1916, known as the Pomerene Act (39 St. L. Ch. 415, p. 538) makes order bills negotiable and definitely makes the Union Pacific liable to him under the pleaded facts of the instant case.

In its opinion (Tr. 16) the Kansas Supreme Court passed squarely upon his contentions, holding definitely that the Pomerene Act does not make interstate order bills strictly negotiable and does not make a carrier liable to a purchaser for value of such an order bill for damages resulting from reliance upon erroneous dates appearing therein. And under that interpretation of the Pomerene Act it was of course further held that the liability of the Union Pacific was determined by the old Federal rule so often announced by this court, and that Browne, the purchaser of the mis-dated order bills, had no greater rights than the original consignor and that lack of authority of the Union Pacific agent to issue the mis-dated order bills constituted a defense to Browne's action.

And by its decision, to which three of the seven justices dissented, the Kansas Supreme Court affirmed the order of the trial court overruling Browne's demurrer to that part of the Union Pacific's answer which set up such defense. And it was to review such decision that this court issued its writ of certiorari herein.

SPECIFICATIONS OF ERROR.

The Supreme Court of Kansas erred in adjudging:

That want of authority of its agent to issue mis-dated order bills constitutes a defense to a carrier in an action brought by a holder thereof for value and in good faith for damages resulting from reliance thereon.

That the Pomerene Act does not make interstate order bills strictly negotiable.

That section 22 of the Pomerene Act does not make a carrier liable to a purchaser in good faith and for value of an order bill who relies upon the recitations thereot for damages caused by mis-dating thereof.

That section 22 of the Pomerene Act limits the liability of a carrier for a mis-description of goods in an interstate order bill to an erroneous "statement or recital of their character, of their sort, kind or species."

ARGUMENT.

Prior to the enactment by Congress on August 29, 1916, of the Pomerene Act (39 Stat. at L. Ch. 415, p. 538) it is clear that a carrier was not liable to an assignee thereof for the mis-dating of an interstate order bill. This court so held in *Atchison, Topeka & Santa Fe Rly. Co.* v. *Harold,* 241 U. S. 371, decided June 5, 1916, which involved a state of facts exactly similar to those herein. Therein this court reversed the Kansas Supreme Court which held that an innocent holder of a bill of lading was vested with rights not available to the shipper and that the carrier was liable to him for damages resulting from reliance upon a mis-dated order bill, and held that such local rule was in direct conflict with the Federal rule in such cases, as repeated in *Shaw* v. *North Pennsylvania R. Co.,* 101 U. S. 557; *Pollard* v. *Vinton,* 105 U. S. 7; *St. Louis, I. M. & S. Ry. Co.* v. *Knight,* 122 U. S. 79; *Friedlander* v. *T. & P. R. Co.,* 130 U. S. 416; and *The Carlos F. Roses,* 177 U. S. 655; referring to the absence of legislation by Congress attributing to order bills the characteristics given them by the Kansas Court.

It is our contention that the Pomerene Act was intended to and does entirely abrogate and change the old Federal common law rule and was intended to and does give to interstate order bills the very characteristics which the Kansas Supreme Court gave to them in the Harold

case. To indicate the difference between the old Federal rule and the provisions of the Pomerene Act we wish to advert briefly to the cited cases:

Shaw v. *Rly. Co.,* 101 U. S. 557, involves a stolen lading. In discussing the negotiability of bills and notes, the opinion states:

> "The purchaser is not bound to look beyond the instrument. * * * The rule was first applied to the case of a lost bank-note, * * * and put upon the ground that the interests of trade, the usual course of business, and the fact that bank notes pass from hand to hand as coin, require it. It was subsequently held applicable to merchant's drafts and * * * to bills and notes, as coming within the same reason."

In differentiating between bills and notes and bills of lading, and in holding that the possessor of a stolen lading is not entitled to possession of the goods, unless a *bona fide* purchaser, it is further said:

> "The function of that instrument (lading) is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank notes or coin. It is a *contract* for the performance of a certain duty. * * * Bills of lading are regarded as so much cotton, grain, or other articles of merchandise. The merchandise is often sold or pledged by the transfers of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions."

In *Pollard* v. *Vinton,* 105 U. S. 7, an agent of the owner of a boat issued a bill of lading for cotton not in fact received, and draft to which the lading was attached was paid in reliance thereon. Boat owner held not liable as agent had no authority to issue such a lading. Of a bill of lading it is said:

> "Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a *negotiable instrument* or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, *all inquiry into the transaction* in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of *bona fides* of purchasers only applies to it in a limited sense."

St. Louis, I. M. & S. Rly. Co. v. *Knight,* 122 U. S. 79, holds that as a carrier is not bound by a recital in a lading of receipt of goods which were not in fact received, it is not bound by such a recital as to the quality of goods received, which recital is untrue.

Friedlander v. *T. P. Rly. Co.,* 130 U. S. 416 holds a carrier not liable to the purchaser of a bill of lading showing shipment of cotton when in fact it received no cotton, following *Shaw* v. *Rly. Co.,* and *Pollard* v. *Vinton, supra.* In the opinion it is stated:

> "It is true that, while not negotiable as commercial paper is, bills of lading are commonly used as security for loans, and advances; but it is only as evidence of ownership, special or general, of the

> property mentioned in them, and of the right to receive such property at the place of delivery."
>
> "It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall on him who enabled such third person to commit the fraud."

But it is held that the carrier was not at fault as its agent, in issuing the lading, was not acting within the scope of his authority.

In *The Carlos F. Roses,* 177 U. S. 655, merchandise on an enemy vessel was captured and an English firm claimed same under bills of lading for which it had paid value. In denying such claim and declaring the goods lawful prize of war, this court said:

> "Bills of lading stand as the substitute and representative of the goods described therein, and, while *quasi-negotiable* instruments, are not negotiable in the full sense in which that term is applied to bills and notes. * * * Inquiry into the transaction in which the bill originated is *not* precluded because it came into the hands of persons who may have innocently paid value for it."

It is clear from these cases that under the rule upon which was based the decision of this court in the Harold case, order bills were not negotiable instruments and the doctrine of *bona fides* had no application. To indicate the great change wrought in the old rule by the Pomerene Act, we summarize the following numbered pertinent sections thereof:

(3) The *negotiability* of an order bill, defining same, shall not be affected unless agreed to by the shipper in writing on its face.

(6) A straight bill shall be marked "non-negotiable."

(7) A named notified party shall not limit the *negotiability* of an order bill.

(9) A carrier may deliver goods to one in possession of an order bill, unless (10) it had been notified or had information that such holder was not entitled to possession of the goods.

(11) A carrier shall be liable for non-delivery to a purchaser for value and in good faith of an order bill.

(20) When goods loaded by carrier insertion in order bill of words "Shipper's weight, load and count" shall be treated as null and void.

(21) When goods loaded by shipper carrier may insert in order bill the words "Shipper's weight, load and count" and if true it shall not be liable for improper loading, non-receipt or misdescription.

> (22) "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or *apparent* authority includes * * * the issuing of bills of lading * * * the carrier shall be liable to * * * (b) the holder of an order bill, who has given value in good faith, relying upon the *description* therein of the goods, for damages caused by the non-receipt by the carrier of all or part of the goods or their *failure to correspond with the description thereof* in the bill at the time of its issue."

(27) An order bill, indorsed in blank, may be *negotiated* by delivery.

(28) An order bill may be *negotiated* by indorsement in blank or to a specified person.

(29) A *straight* bill *cannot* be negotiated free from existing equities and its indorsement gives the transferee no additional right.

(30) An order bill may be *negotiated* by anyone in possession thereof.

> (31) "That a person to whom an order bill has been duly *negotiated* acquires thereby—
>
> (a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith; and
>
> (b) The direct obligation of the carrier to hold possession of the goods for him *according to the terms of the bill* as fully as if the carrier had contracted directly with him."

(32) One to whom a bill has been transferred, but *not negotiated,* acquires title to the goods as against the transferor.

(33) Indorsement of an order bill transferred for value by delivery, may be enforced where essential for *negotiation.*

(35) Indorsement of a bill shall not make the endorser liable for the carrier's failure to fulfill its obligations.

> (37) "That the validity of the *negotiation* of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, * * * if the person to whom the bill was negotiated * * * gave value therefor in good faith, without notice of the breach of duty, * * *"

The whole intent and purpose of the act is obviously to change the old Federal common law rule and to give to order bills all the attributes of commercial paper, and the same kind and degree of negotiability that most state courts have always given to them, as instanced by the decision of the Kansas Supreme Court in the *Harold* case, *supra,* later reversed by this court.

The act clearly makes an order bill more than "a contract for the performance of a certain duty," the limitation fixed in *Shaw* v. *Bank, supra.* It makes an order bill *negotiable* and applies the doctrine of *bona fides* of purchasers in almost every section, thus changing the rule as announced in *Pollard* v. *Vinton* and *The Carlos F. Roses, supra.* It specifically gives to order bills attributes other than mere evidence of ownership of the goods conveyed, with the right to receive same, the only function allowed them in *Friedlander* v. *Rly. Co., supra.* And in binding a carrier by the acts of its agent within the apparent scope of his authority, it precludes the defense relied upon in the *Friedlander* and *Pollard* cases, *supra.*

Under the Pomerene Act the rights of one to whom an order bill has been negotiated comprise two elements —the liability to him of the indorser thereof, and the liability to him of the carrier issuing such order bill. As to the first element we are not concerned herein. As to the second elements, Sections 10, 11, 12, 22, 31-b and 35 all pertain to the liability of a carrier to a transferee of an order bill, thus clearly indicating a purpose to give to

order bills all the ordinary attributes of negotiable paper, as well as some additional ones.

But the Union Pacific, while conceding herein to a limited extent such intent and purpose of the Pomerene Act, contends that Section 22 of the act specifies particular instances wherein a carrier is made liable to an assignee of an order bill and hence that liability is limited to such specified instances. *"Expressio unius est alterius Exclusio."* This is true, of course, but in interpreting Section 22 and also Section 31, and in determining their meaning as applied to the facts of the instant case, the general purpose of the act is controlling.

Under the issues raised by the pleading herein, it is admitted that it was within the scope of the apparent authority of the Union Pacific agent to issue order bills; that Browne was a purchaser and holder of the bills involved herein, he having given value therefor, in good faith, relying upon the recitations contained therein as to dates when the shipments originated; that the actual dates of shipment did not correspond with the dates inserted in such order bills at the time of their issue; and that Browne was damaged because of relying on such mis-dated bills.

So the first question for determination by this court is whether, in view of the general intent and purpose of the Pomerene Act, the expression "description of the goods" contained in Section 22, refers merely to their physical attributes, or refers generally to a description of the *shipment*, as such, which would include place and date of origin.

The Kansas Supreme Court held (Tr. 19) that the Pomerene Act does not make order bills "unqualified negotiable instruments" "although it does clothe them with certain attributes of negotiable instruments" and further, that "it would be an undue extension of the statutory words 'description of the goods' to say that the date of shipment of the goods as shown by the bill of lading is part of the description. A description of a carload of goods is a statement or recital of their character, of their sort, kind or species." And suggests that a car of yellow corn, described as white, or a car of wheat described as oats, would be a mis-description within the purview of the act. Admittedly, but a bill of lading *never* contains the detail of the color or grade of grain, and did anyone ever hear of a single instance where wheat was billed as oats? Assuming that the act was intended to cover probable contingencies and to remedy known difficulties in the handling of order bills, it is very evident that Congress had no intent to delimit the meaning of the statutory words to the extent held by the Kansas Court.

An examination of the wording of Section 22, discloses that under its provisions a carrier is liable to a purchaser of an order bill, relying upon the *description therein of the goods,* for damages caused by *non-receipt* of any part of the goods. This is patently meant to apply in cases of over-billing. One purchasing an order bill in reliance on its recitation that the carrier had received 80,000 pounds of wheat, when in fact but 40,000 pounds had been received, can recover his resulting damage from such carrier. But note that the act refers to

reliance, not on the bill of lading weight, but upon the *description of the goods* contained in the order bill.

If, as the Kansas Supreme Court holds, a "description of the goods" can be no more than a recital of their character, kind, sort or species, it would not include the bulk weight of the *shipment*. And under that interpretation the act would mean that one who purchases an order bill covering shipment of a car of grain relying upon the recital therein of its *character, sort or kind,* that is, whether wheat, or oats, red or hard, can recover damages from the issuing carrier for *shortage in weight.* And that does not make sense. Why should an innocent purchaser of an order bill be allowed to recover on an over-billed car of grain, when he relied *not* on the bill of lading weight, but only upon the recital as to the *kind* of grain?

The attorneys for too many carriers are settling claims brought under this section, and based on over-billed cars of grain, for it to be said that it does not allow damages for the difference between the actual weight of grain received and the weight stated in the order bill.

So to give any meaning whatever to Section 22 of the act it must be held that the expression "description of the goods" as used therein, in connection with "non-receipt of all or any part of the goods," includes the bulk weight of the shipment and not merely the kind, sort or species of the commodity transported.

If the meaning of the statutory words, "description of the goods" has to be extended to include bulk

weight of the shipment, to give any force whatever to the non-receipt part of Section 22, would it be such an undue extension of the meaning of such words to also include other data concerning the shipment, such as date thereof?

It is our contention that Section 22 of the act was intended to mean, and does mean, that a carrier is liable to an innocent purchaser of an order bill, relying on the material *recitations* therein contained, for damages caused by the falsity or inaccuracy of such *recitations*, such as non-receipt of all or part of the goods as shown by the bill of lading *weight*, or mis-dating, or erroneous statement of place of origin, or a false recitation that the freight charges were prepaid, as well as mis-statements as to the kind, sort or species of commodity carried.

While every shipper and receiver of bulk freight is interested in the extent of the negotiability of order bills, the problems of grain dealers are illustrative of the reasons for their strict negotiability. Hundreds of millions of bushels, or hundreds of thousands of car loads, of bulk wheat alone are transported annually by the carriers of the middle west. And practically without exception such shipments are handled under shipper's order bills of lading. And the financing of such a crop movement is made possible only by the constant and repeated negotiation of such order bills. The country elevator, which buys direct from the farmer, is able to operate on a small capital and at the same time to pay cash, because of its ability, as soon as it has bought enough for a car load, to ship it out under an order bill, attaching

same to its sight draft on the wholesale dealer at some neighboring city, which draft its local bank gives it credit for, as a cash item, thus enabling it to buy more grain from the farmer. The wholesale dealer may sell the car of grain to another dealer, as Past sold to Browne the wheat in question herein, in which case he in turn draws with the order bill attached, and gets credit at once, at his local bank, enabling him to buy more cars of wheat. Then the second dealer may sell to an exporter, at the Gulf or on the Atlantic seaboard, or to a mill, as Browne had sold the wheat in question to the Gladney Mill at Sherman, and he likewise attaches the order bill to his sight draft which is credited as a cash item at his local bank. The mill in turn ships out its flour and feed stuffs under order bills, attached to sight drafts on its customers.

And this immense commerce is made possible by reliance by each successive purchaser of an order bill on the *recitations* therein contained. And what are such recitations? One of course is that of the *kind* of grain shipped, as wheat, oats or corn, but never as to their character or species, for no order bill of grain ever contains a recital of the grade, color, variety, test weight or quality of such grain. The weight appearing in an order bill of grain is most material, for the amount of the draft which the bank will discount, or the purchaser pay, is dependent directly upon the acknowledgment by the carrier in its order bill of the number of pounds of grain it had received in the numbered car. For seldom

if ever, does a puchaser of grain have any information, when he pays the draft of the seller prior to arrival of the car, as to the amount of grain in the car, other than the bill of lading weight. The point of origin is relied upon, also, for as an instance, it frequently happens that a mill will pay many cents a bushel more for wheat originating in a certain territory, because of its high protein content perhaps, or other known quality, than for wheat shipped from other points. The place of origin is also material in enabling the assignee to determine what freight charges will accrue before he pays his vendor's draft. And such assignee's knowledge, when he takes up the seller's draft with order bill attached, of the place of origin of the particular car, is based on the statement made by the carrier in such order bill. Also a statement in an order bill that freight charges have been prepaid, or not, is relied upon in paying a grain draft. If grain is sold at a price basis point of origin and shipped to Minneapolis, the seller pays the freight, either by prepaying same, or by deducting the amount from his draft and allowing the buyer to pay same. If an order bill is stamped by the carrier "freight prepaid" the buyer, in paying the seller's draft to which it is attached and in reliance thereon, would pay the full purchase price basis point of shipment. And if the freight was in fact not prepaid, if such recital was untrue, then in order to get his car of grain on its arrival he would have to pay the freight charges in addition to the purchase price.

And the date of shipment as stated in an order bill is always material, and relied upon. Recently a grain dealer attempted to borrow of a bank on an order bill the then market value of the 80,000 pounds of wheat covered thereby—a usual and common occurrence. The banker inspected the order bill which showed receipt by the carrier of the full amount of the wheat, but at a nearby town, ninety days before. That meant of course that the car of wheat had been on track and drawing demurrage for nearly ninety days, and consequently was worth several hundred dollars less than it would have been otherwise. In determining the then value of that car of wheat, on track, the banker had to, and did, rely both upon the date and place of shipment as stated in the order bill. If the date had been erroneous the banker might easily have been defrauded out of hundreds of dollars.

A decision illustrative of the importance of correct dating is: *Saugerties Bank* v. *Del. & H. Co.*, (N. Y.) 141 N. E. 904. Therein the carrier failed to take up order bills upon delivery of car lots of wheat, and the holder several months later changed dates thereon to show recent shipment and borrowed money thereon, holding the carrier not liable to the bank, because the criminal alteration of the bills, not the failure to require surrender thereof, was the proximate cause of the loss to plaintiff, it is stated that the bank relied on the misdated bills and of course would not have made the loan had the correct dates appeared.

But the most common instances of reliance on bill of lading dates are those such as herein, for time is the essence of every contract for the purchase of grain, and practically all such contracts are based on a specified time of *shipment*.

We wish particularly to call attention to the fact that it is not the date of *delivery* that is specified in grain contracts, as this court erroneously assumed in the case of *Santa Fe* v. *Harold, supra,* but the date of *shipment*. A contract for the sale of grain for shipment by January 1st is complied with if the grain is billed or shipped from point of origin by the specified date, regardless of date of delivery. All claims against carriers for delay in transit of grain shipments are made by the purchasers, not the sellers.

And in determining whether a shipment of grain sought to be applied on contract is in fact appliable thereon, the purchaser always inspects the date appearing in the order bill tendered to him, *and relies thereon*. If it shows shipment within contract time, then and not till then, does he pay the draft to which it is attached and becomes the holder for value of such order bill.

Surely Congress had in mind these usual, common and everyday commercial practices and customs when it enacted the Pomerene Act of forty-five sections, specifically making order bills negotiable and defining the duties of carriers as to assignees of such order bills and by Section 22 declaring the liabilities of carriers to purchasers thereof, in good faith and for value.

Presumably the recommendations of the American Bar Association, the various committee hearings had in Congress and the arguments therein relative to the necessity of a Federal Bill of Lading Act were premised on actual abuses or practices that needed remedying. Unquestionably one of such abuses was the issuance by carriers of order bills acknowledging receipt of a certain weight of grain or other commodity when in fact a lesser amount or none at all was received. But why should Congress concern itself in declaring carriers liable in such instances, and not in the other multitudinous instances in our commercial activities where erroneous statements in order bills result in damages to innocent purchasers thereof? In determining the conditions which Congress sought to remedy, why delve into the realm of conjecture to find possible examples of erroneous descriptions in order bills, such as describing yellow corn as white, or describing horses as hogs, when our commerce is replete with actual instances of damages resulting from reliance on mis-statements?

As stated in the dissenting opinion to the Kansas Supreme Court decision (Tr. 20), why insert the place and date of origin of a shipment in an order bill at all, except to give material information by such additional description of the shipment?

For the goods mentioned in Section 22 of the Act as being described in an order bill comprise a shipment, not goods exhibited at a county fair. It is the shipment that the purchaser of an order bill is concerned with—the kind and bulk weight of the commodity, place and

date of shipment, destination, consignor, freight charges to be paid, and routing, all data of which the carrier's agent has knowledge when he issues an order bill, and not the quality, variety or texture of the individual articles comprising the shipment and of which the agent would know nothing.

And note another inconsistency in the construction placed on the Pomerene Act by the Kansas Supreme Court. It rules, in effect, that though an agent of a carrier binds his principal when he states in an order bill the bulk weight of wheat shipped, of which he has no personal knowledge but relies on the statements of the shipper, or should he state therein the species or other physical attributes of such wheat, which he would have to go out in the railroad yards to ascertain, yet such agent does not bind the carrier, and acts without the scope of his authority when he inserts in the order bill the date thereof, a matter of which he has absolute knowledge. Or in the issuance of an exchange order bill, as in the instant case, where the agent had only to copy correctly the data appearing in the surrendered original order bill, it is held that no duty of accuracy is owing to those to whom such order bill may be negotiated.

That the Pomerene Act was enacted to remedy certain well-known evils which had become prevalent in commerce is shown by Senate Report No. 149, thereon, appearing at page 3833, Vol. 53, Part IV, of the Congressional Record. After stating that the bill was the

result of the labors of the commissioners on uniform laws of the American Bar Association, after repeated conferences with bankers, railroad and shippers organizations, it is said:

> "On these bills of ladings (interstate) it is estimated that $5,000,000,000 in cash was advanced annually by the banks. It must follow, therefore, that any reasonable legislation which will lead to the security of these bills of lading in the hands of their owners or holders must be of immense value to the commerce of the country."

After quoting from the decision in *Friedlander* v. *Rly. Co.*, 130 U. S. 416, holding that a carrier is not liable to a holder in good faith and for value of an order bill fraudulently issued by the carrier's agent without receipt of the goods named in it, it is further said:

> "This ruling has resulted in great loss to the buyers of merchandise who have the right to depend upon the *bona fides* of bills of lading, to bankers and financial men who have bought or discounted drafts secured by these bills of lading, and to sellers and buyers of cotton, grain or other merchandise, whose transactions are discredited by reason of the frauds which have been perpetrated by fraudulent shippers conspiring with freight agents. As a result millions of dollars have been lost to commerce."

While it happened that the case cited in the committee report dealt with a lading issued without receipt of any of the goods covered thereby, yet that evidently was not the only condition sought to be corrected for the report indicates clearly that the purpose of Congress was

to protect generally the *security* of order bills and to give holders thereof the right to depend on their *bona fides* in all particulars. And the Act itself, while making a carrier specifically liable for non-receipt of goods *described* in an order bill, then very obviously attempts to cover all other instances of untrue recitations that might be relied upon, without enumerating all that had or might occur, by making a carrier liable for failure of the commodity transported to correspond with its description in the bill.

The purpose of the Act being avowedly to assure the *bona fides* and security of order bills in commercial channels, why should it be presumed that Congress intended to legislate against less than all of the frauds that were being perpetrated by untrue statements in order bills?

That the mis-dating of order bills has long been an evil of commercial transactions and one which Congress must have had in mind when enacting the Pomerene Act, is further shown by rulings of the Interstate Commerce Commission.

On January 20, 1910, it issued the following order:

> "It having come to the attention of this Commission that in a number of instances carriers subject to the Act have, at the request of shippers, issued bills of lading under dates other than the dates of the actual receipt of the property by said carriers for transportation, and it further appearing that by means of such misdating of such bills of lading, the consignors thereof have perpetrated various frauds upon the consignees thereof.

IT IS ORDERED, That all carriers subject to the Act to Regulate Commerce be warned that a false entry as to date, or otherwise, upon a bill of lading, is a misdemeanor within the meaning of Section 20 of said Act, and that in case of any such false entry hereafter arising, criminal prosecution of those responsible therefor will be requested.

It is further ordered, that a copy of this order be served upon all parties subject to the Act to Regulate Commerce."

Later and on November 17, 1910, it issued a supplementary order, which, after quoting the foregoing order, added:

"An investigation by the Commission has developed the fact that certain rail carriers at Chicago, Ill., and at other points are issuing bills of lading showing a date prior to that upon which shipping instructions are received by the carrier. These bills of lading purport to show that cars are in course of transportation to named consignees on a date prior to that upon which such consignees are indicated to the carrier. In specific cases brought to the attention of the Commission this has resulted in loss to buyers of property through the presentation of such bills of lading as proof that shipments had been made on *contract days*, although such shipments had not been ordered forward until some days after the date shown in the bills of lading. Therefore,

It is further ordered, that all carriers subject to the Act to Regulate Commerce be warned that not only must property to be transported be in the possession of the carrier issuing bill of lading therefor at the time of such issuance, but such bill of lading must be dated as of the day upon which the shipping instructions are fully given and the carrier finally authorized to forward the property."

Then in 1911, a further order was made relative to dating bills of lading, wherein it was stated:

> "Some carriers date such bills of lading as of the day they are actually made. Others follow the date upon the switching ticket. The latter practice was the occasion for our order of November 17, 1910. The bill of lading contains the contract for transportation to a named destination. Such contract should be dated as of the day that it is actually made; that is to say, the day that such destination is indicated to the carrier and the shipment committed to it under the contract of transportation thereto. The practice of mis-dating bills of lading in such cases is not only a violation of the law against making false entries, but it has been the occasion for frauds upon purchasers *under time contracts*, to which frauds carriers should not be accessories."

And the facts appearing in the case of *Santa Fe* v. *Harold, supra*, again showed to Congress the commercial necessity of giving purchasers of order bills the right to depend upon the *bona fides* of the dates inserted therein by the issuing carriers.

The practice of mis-dating order bills and the resultant frauds upon purchasers under time contracts being so common as to require three separate orders of the Interstate Commerce Commission within two years, and the identical matter having been before this court, is it reasonable to assume that Congress, in legislating upon the subject of the negotiability of order bills, intended to protect innocent holders thereof only against misdescriptions as to bulk weights, and as to the sort or

species of commodity, and *not* to afford protection against such mis-datings?

While legal and judicial constructions of the Pomerene Act are few as yet, all agree that order bills are thereby made negotiable.

In *Matters of Bills of Lading*, 52 I. C. C. 671, the same tribunal which found it necessary to make three separate orders relative to mis-dated order bills, says:

> "The primary purpose of this law is to enlarge and enhance the negotiability features of 'order' bills of lading and by definitely fixing the law with respect to negotiability, and the imposition of *greater responsibility upon carriers*, to afford greater protection to those who in the course of *commercial* transactions handle and deal in such bills."

Yet if the contentions of the carrier herein are correct the only responsibility added to carriers for the protection of those purchasing order bills is liability for *non-receipt* of goods described therein.

Pioneer Trust Co. v. *Rly. Co.*, (Mo.) 224 S. W. 109, recognized the applicability of the old Federal rule to a shipment originating prior to the passage of the Pomerene Act, but in the opinion it is said:

> "The manifest hardship done the innocent holders of bills of lading by the rule found in Federal cases is alleviated to a great extent by the Pomerene Bill of Lading Act making interstate bills of lading *negotiable*."

Shaw Co. v. *Coleman*, (Tex.) 236 S. W. 178, does not involve the liability of a carrier but it does hold that

the carrier violated its duty under an order bill by delivery without an order of the consignee, an order bill being *negotiable*.

In *Rainbolt* v. *Sampson*, 259 Fed. 564 (8th C. C. A.) reference is made to the Pomerene Act as making order bills *negotiable* though the decision is not based on that point.

In *Rainbolt* v. *Sampson*, 259 Fed. 564 (8th C. C. A., referring to the Pomerene Act, states:

> "The evident intention of the act is to make straight bills of lading non-negotiable and order bills *negotiable*."

In *New York P. R. S. S. Co.* v. *Lumber Co.*, (1 C. C. A.) 284 Fed. 513, the shipper recovered from the carrier for mis-delivery under an interstate order bill. The judgment was affirmed and the following instruction was approved:

> "I charge you as a matter of law that the bills of lading involved in this case, and upon which the shipments referred in evidence were made, are *negotiable* order bills of lading."

American Hide and Leather Co. v. *So. Rly. Co.*, (Ill.) 142 N. E. 200 construes the Illinois Uniform Bill of Lading Act and holds:

> "The purpose of the statute was to give security to bills of lading in the hands of those who parted with value in good faith, relying on their being *true*. A Federal Bill of Lading Act contains a provision (22) substantially like Section 23, appliable to interstate commerce."

In *Pere Marquett Rly. Co.* v. *French,* 254 U. S. 538, considerable light is thrown upon the purposes of the Pomerene Act. Therein was involved the liability of a carrier for delivering a car of goods without requiring a surrender of the bill of lading. In the opinion it is said:

> "Prior to the enactment of the Pomerene Act, bills of lading were *not* negotiable instruments and one who did not have valid title to the goods could not by transfer of the bill of lading, give a good title to a *bona fide* holder."
>
> "When, in the interests of commerce, the Federal Uniform Bill of Lading Act extended to bills of lading certain characteristics of negotiable paper in order to protect the *bona fide* purchaser of such bills it was deemed proper to afford also certain protection to the carriers."
>
> "The purchaser whom the act protects is he who is entitled to assume that the carrier has not delivered the goods and will not thereafter deliver them except to a person who holds the bill of lading. The purposes of Sections 10, 11 and 12 is to give bills of lading *attributes of commercial paper.*"

Leigh Ellis v. *Payne,* (Ga.) 274 Fed. 443, holds that a carrier issuing an order bill for 200 bales of cotton, weight (subject to correction) 99,300 lbs. is not liable to a purchaser of the order bill for underweight, as Sec. 20 of the Pomerene Act, relative to package freight, applies and not Sec. 22.

It is also held that any liability as to weight is qualified by the "subject to correction," although "This conclusion militates greatly against the attainment of one of

the aims of the Bills of Lading Act." Also, relative to recitations in an order bill covering bulk freight, it is said, "Section 22 imposes a liability for failure in *accuracy* of the statement so made in an order bill, making them in *effect warranties.*"

It is further held that recovery from the carrier was barred by the two-year limitation in the order bill itself, and on this ground the decision was affirmed by the Fifth Circuit Court of Appeals in 276 Fed. 400.

On writ of error to this court, 260 U. S. 682, such decision of the Court of Appeals was affirmed on the sole ground that the action was barred by the limitation of the bill itself, which required that "suits, for loss damage or delay" must be brought within two years and a day. It was contended that the words, "loss, damage or delay" applied only to the physical goods and not to statutory liability arising from *misdescriptions* in the order bill. But this court held that liability for over-billing "is of the kind that the clause 'suits for loss, damage or delay' manifestly *intended* to limit, and we see no reason why it should not be included under the head of loss."

If this court interprets the clause, "loss, damage or delay" is intended to include liability for over-billing, then surely it would be as reasonable to hold that the clause "description of the goods" in an order bill covering their shipment was manifestly *intended* to include the date of their shipment.

As said by Mr. Justice Reynolds of the concept "property"—

> "The accurate delimitation of the concept 'description' would afford a theme especially apposite for amplificative philosophic disquisition."

If, as held by the Kansas Supreme Court, a description of anything is limited to a recital of its kind, sort or species, a description of a girl is complete without including the date and place of her origin, though that data might alone be informative as to her age, temperament, disposition, nationality and even size, looks and complexion. So the date of shipment of a car lot of eggs or perishable fruit might be highly descriptive thereof.

Considered with the other sections of the Act, Section 31 is highly significant under the facts of the instant case, it providing that one to whom an order bill has been *negotiated*, thereby acquires the direct obligation of the carrier to hold the goods for him *"according to the terms of the bill."* Some of the terms of an order bill are that the carrier acknowledges receipt of a named quantity of goods at a certain place and *time* and agrees to transport same to a designated place. In the instant case one of the terms of the bills was that the wheat had been shipped originally on certain dates. The Union Pacific did not hold possession of such wheat for Browne according to such terms, for that was impossible, hence it breached its direct obligation to him.

So regardless of the provisions of Section 22, the Union Pacific became liable to Browne for such breach, and the circumstances under which the false terms were

inserted in the bills could constitute no defense to an action for damages therefor.

Opposing counsel have contended that Section 3 of the Act imports an intent *not* to make order bills strictly negotiable, it providing:

> "Any provision in such a bill * * * that it is non-negotiable shall be null and void and shall not affect its negotiability within the meaning of this Act unless upon its face and in writing agreed to by the shipper."

Surely the very wording of this section indicates the complete negotiability of order bills, for unless agreed to in writing, any limitation of negotiability is *null and void*. Patently the expression "within the meaning of this Act" applies to those attributes given thereby to order bills which would not be found in ordinary negotiable paper, such as negotiation in blank, duties of consignor to his assignee, right of transferee to compel indorsement by transferor where essential for negotiation, and the freedom from liability of an indorser for failure of the carrier to fulfill its obligations. Section 3, instead of limiting the strict negotiability of order bills, gives to them attributes of negotiability not found in ordinary commercial negotiable paper.

And taken in connection with other sections of the act the provision of Section 3 that negotiability shall not be affected within the meaning of the act certainly does not circumscribe such negotiability. Other sections provide:

7. That the naming of a notify party "shall not limit the negotiability of the bill"; 27 and 28, that an order bill may be negotiated in blank and by delivery; 29, that a *straight* bill can*not* be negotiated free from existing equities; and 30, that an order bill may be negotiated by anyone in possession. Why differentiate between straight and order bills, declaring that the former can*not* be negotiated *free from existing equities*, if it was not intended that order bills *could* be negotiated free from such equities?

It seems apparent that Section 3 of the act broadens rather than narrows the scope of the negotiability of order bills. An act merely declaring order bills to be negotiable would not have given to them all the various attributes, rights, powers and qualities that the Pomerene Act does. So Section 3 might well have declared null and void any restriction of negotiability within the meaning of *any* of the provisions of this act.

The Pomerene Act itself, and the judicial decisions construing same, all clearly manifest an intent to make carriers liable for inaccuracies appearing in order bills. And no provision or section of the act limits such liability. And if a carrier is liable for mis-statements of fact appearing in order bills issued by its agent, then it could constitute no defense that such agent was without authority to issue such inaccurate order bills.

Conclusion.

It is for this court to determine herein the degree of negotiability given to interstate order bills by the Pomerene Act, and to construe the provisions of Section 22 thereof.

The limitation of the negotiability of shipper's order bills of lading by the application of the old federal common law rule led to numerous evils and abuses in the attempted negotiation thereof. Shippers would collude with the agents of carriers and procure the issuance of order bills showing the receipt of goods when in fact no goods were received by the carrier for transportation, or showing receipt of goods on a certain date when not in fact received until later, all resulting in loss to buyers of such order bills who relied upon the recitations therein as proof that the goods were in fact received by the carrier, or that the shipments had been made within contract time. As immense sums were advanced annually by banks and merchants in reliance upon the recitations of order bills, it became necessary, in the interests of commerce and trade, to protect the security thereof and to protect purchasers thereof who depended upon their *bona fides*. So in 1916 Congress enacted the Pomerene Act, the whole intent and purpose thereof being patently to make order bills strictly negotiable and to afford every protection to those who, in the course of trade, gave value therefor, against not only the indorsers thereof but also against the errors and frauds of the carriers issuing same.

The act specifically makes a carrier liable on an order bill issued by its agent the scope of whose real or apparent authority includes the issuing of order bills, to a holder thereof for value and in good faith, who relies upon the description therein of the goods, for damages caused by their failure to correspond with such description. Does that mean that a bank, or grain dealer, in advancing money on order bills, can rely upon statements in such order bills as to the kind, sort or species of the goods described in the order bill, but cannot rely upon statements descriptive of the shipments itself, such as date and place of origin, routing, payment of freight charges, destination, or name of consignor? The Supreme Court of Kansas so held, and it is for this court to determine whether such decision was correct.

Browne, petitioner herein, is one of those whom the Pomerene Act obviously sought to protect. The Union Pacific, through the fraud or carelessness of its agent, loosed in the channels of trade certain order bills which contained untrue statements descriptive of the shipments, which untrue statements were relied upon by Browne, to his damage. He assumed, of course, that the recitations in the order bills which he purchased were accurate, not only as to the kind of goods transported and their weight, but as to the dates when the shipments originated.

As indicated by the orders of the Interstate Commerce Commission relative to mis-dating order bills, Browne is but one of thousands who rely upon the

dates appearing in order bills as proof that the shipments originated within contract time. And if the liability of a carrier for untrue statements appearing in order bills is to be limited, as held by the Kansas Supreme Court, then Congress failed signally, in the Pomerene Act, of its avowed purpose to afford security to such bills and to protect those who depend upon their *bona fides*.

Surely the intent of Section 22 of the Pomerene Act, construed in connection with the other sections of the act, is to make carriers liable for inaccurate or untrue recitations in order bills, where such recitations are relied upon by purchasers in good faith and for value, to their damage.

And if this is true, it follows that it can be no defense to a carrier, when such damages are sought to be recovered, that it was without the scope of its agent's authority to issue order bills containing such untrue and inaccurate statements.

Those parts of the answer filed by the Union Pacific in the trial court, and which were attacked by demurrer, constituted no defense to Browne's action for damages and it was error to overrule the demurrer thereto, and it was error for the Kansas Supreme Court to affirm such ruling.

Petitioner earnestly insists that the decision of the Kansas Supreme Court should be reversed and that this case should be remanded for further proceedings in accordance with the true meaning and intent of the Pomerene Act.

Respectfully submitted,

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No. 194.

IN THE

Supreme Court of the United States

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C. V. BROWNE, PETITIONER,

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REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Petitioner desires to reply briefly to the points raised by respondent in its brief.

I.

Respondent first contends that the decision herein of the Kansas Supreme Court can be rested upon issues of local pleading and practice without involving any Federal question and that therefore the Writ of Certiorari should not have been granted herein.

It will be noted however, from the opinion (Tr. 16), that such decision is based solely upon an interpre-

tation and construction of the Pomerene Act. In the Kansas Supreme Court the syllabus of a decision is written by the court and Section 1 thereof shows clearly the basis of the decision which this court has consented to review. And in its opinion the Kansas Supreme Court says (Tr. 19):

> "Plaintiff contends that the text and effect of this act (Pomerene Act) is to make shipper's order bills of lading unqualified negotiable instruments. The act does not specifically so declare, although it does clothe them with certain attributes of negotiable instruments within the meaning of this act."
>
> "A careful reading of the federal statute discloses no language which by fair intendment can be said to impose a liability on the carrier in favor of an innocent transferee of an order bill, for inaccurate or incomplete dating thereof; * * * It follows that insofar as defendant's demurrer involved the *question chiefly urged here*, the ruling of trial court was correct."

The ruling on matters pleaded in defendant's Answer to which the plaintiff demurred is patently based on the conclusion, previously reached, that the Pomerene Act does *not* make order bills "unqualified negotiable instruments." Had such conclusion been otherwise, and had it been held that Section 22 of the act applies to misdating of order bills, then certainly the petition in the trial court stated a cause of action against respondent carrier and in favor of petitioner, the holder of the order bills, who had given value therefor in reliance on the datings thereof, for damages caused by their misdating.

And in such case, it could constitute no defense to petitioner's action for recovery of such damages, that the carrier had no notice of how such damages might arise or what they would be or that it was the custom for the carrier to allow its order bills to be prepared by the shipper who imposed upon its agent and that it was without the scope of its agent's authority to issue order bills containing erroneous statements, or that petitioner might have suspicioned that respondent's agent had misdated the order bills in question from the fact that the cars of wheat were slow in moving from Idaho to Texas.

Having ruled that the Pomerene Act had no application, and hence that respondent might plead all defenses that were good prior to its enactment, it became necessary for the Kansas Supreme Court to then rule whether the parts of the answer demurred to constituted such defense; and that is all that such court did.

The Kansas Supreme Court met squarely the issue as to whether order bills are negotiable or merely quasi-negotiable. And with its decision standing unreversed, the only liability in Kansas of a carrier to a dealer or banker who advances money in reliance on the recitations of an order bill is for false statements as to the amount of goods received or as to their kind, sort or species. And those who, in commercial transactions, are damaged because of reliance upon other false statements, such as date or place of shipment, routing, or prepaid freight, are without recourse.

And it was this far-reaching construction of the Pomerene Act which this court has seen fit, by certiorari, to review.

The decision of the Kansas Supreme Court, being based squarely on its construction of the Pomerene Act, could not be rested upon matters of state practice as contended by respondent in the following lettered paragraphs of its brief:

(a) The question whether Browne was required to accept the shipments under his contract with Past, even had the order bills correctly shown that they were out of time, necessarily had to be raised by demurrer to his petition, not by his demurrer to the answer. But the petition alleges (Tr. 4) that he *did* rely on the dates in the order bills and that he would *not* have paid the drafts to which they were attached had they been correct. So under the Pomerene Act a demurrer to the petition on that ground, even had one been filed, could not have been sustained.

(b) As to the fourth paragraph of the answer (Tr. 10), it will be noted that respondent does not deny therein the allegation of the petition that it was within the scope of its agent's authority to issue bills of lading, but merely alleges that it was not within the scope of his authority to issue bills *"containing any false or erroneous statements."*

And certainly if Section 22 of the act applies to the facts herein, such allegations could constitute no defense to petitioner's cause of action.

(c) And if order bills *are* negotiable, a purchaser thereof is justified in relying on their recitations as to dates of shipment, regardless of suspicions, surmise or conjecture based on the extremely variable time that it might take for a car of wheat to move from Idaho to Sherman, Texas. Respondent's answer did not allege that petitioner knew of its fraud, but merely that he might have suspicioned same because the wheat had not yet arrived when he took up the drafts with order bills attached.

If petitioner was justified, under the Pomerene Act, in relying on the recitations of the order bills, then it would constitute no defense herein that he might have suspicioned that such order bills were false. The rulings of the Kansas Supreme Court are all based on its conclusion that the Pomerene Act, has no application to the facts herein. If that conclusion is correct, then such rulings are also correct. But the whole decision is based on the Federal question of the application and construction of the Pomerene Act.

II.

Respondent next contends that as it denied knowledge by usage and custom, or otherwise, that the shipments in question were to be applied on contract, petitioner could not recover special damages, and no general damages were pleaded.

If the Pomerene Act applies to the facts pleaded herein, then respondent would be liable to petitioner for the damages caused by the misdescription contained in

the order bills. And such damages would be what petitioner lost as a result of his misplaced reliance. As said in *C. M. & St. P. Rly. Co.* v. *McCaull-Dinsmore,* 253 U. S. 96:

> "The rule of the common law is not an ordinary fiat, but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed."

The petition shows (Tr. 8) that Browne paid Past's drafts, with order bills attached and in reliance thereon, for $9950.00 and paid $1651.16 freight charges, or a total of $11,601.16. If the order bills had not been misdated he would have received therefor from the Gladney Mill the sum of $12,117.60. But because of the misdating he was able to realize out of the order bills, and the wheat they represented, but $8709.52, less demurrage of $607.00 or a net to him of but $8102.52. This was $4,015.08 less than he *should* have gotten for the wheat and $3498.64 less than he *actually paid out for it.* So regardless of his sale contract, or respondent's knowledge thereof, the pleadings do show that petitioner suffered actual damages of $3498.64.

This action was not brought to recover damages for delay in transportation, as is indicated by respondent, but to recover the actual damages suffered by petitioner and caused by the failure of the shipments to correspond with their descriptions in the order bills, a liability specifically placed on carriers by Section 22 of the Pomerene Act.

And even had the carrier not had knowledge that the shipments in question were to be applied on contract, it would be liable, under the act, for the loss to petitioner of what he would have had, had the order bills contained no untrue statements.

III.

Respondent further contends that the expression, "Description of the goods," used in the Pomerene Act, refers merely to a recital of their kind, sort or species, as held by the Kansas Supreme Court. In quoting Section 22 of the Act, on page 11 of its brief, respondent omits the words—"relying upon the description therein of the goods"—which immediately follow the provision that a carrier shall be liable to the holder of an order bill who has given value in good faith. And these omitted words are necessary in construing the section.

The very fact that the act makes a carrier liable for *non-receipt* of the goods to one who has given value for an order bill in reliance upon the *description* therein of the goods, indicates that Congress itself extended the meaning of the words, "description of the goods," beyond a mere recital of their sort, kind or species and to include their bulk weight. And it is no broader extension of the meaning of these words to include "date of shipment" than to include "bulk weight."

In the excellent brief filed herein by Luthur M. Walker as *amicus curiae*, it is very clearly shown that the courts of this country and of England have definitely held that the date of their shipment is a *part of the description of the goods.*

As Congress is presumed to have known, when it enacted the Pomerene Act, of the decision of this court in *A. T. & S. F. Rly. Co.* v. *Harold,* 241 U. S. 371, holding that order bills were not negotiable, and of the various judicial decisions that the date of shipment comprises a part of the description of goods shipped, it seems very clear that the Pomerene Act does make carriers liable for damages resulting from misdating of order bills and that the description of goods referred to in Section 22 thereof includes the date of their shipment.

The decision of the Kansas Supreme Court herein, affirming the rulings of the trial court, was based squarely upon its construction of the Federal Bill of Lading Act of 1916, and not upon issues of local pleading and practice. And such decision was erroneous in that it held that interstate order bills of lading are not strictly negotiable and that the date of shipment of goods does not comprise a part of their description.

Respectfully submitted,

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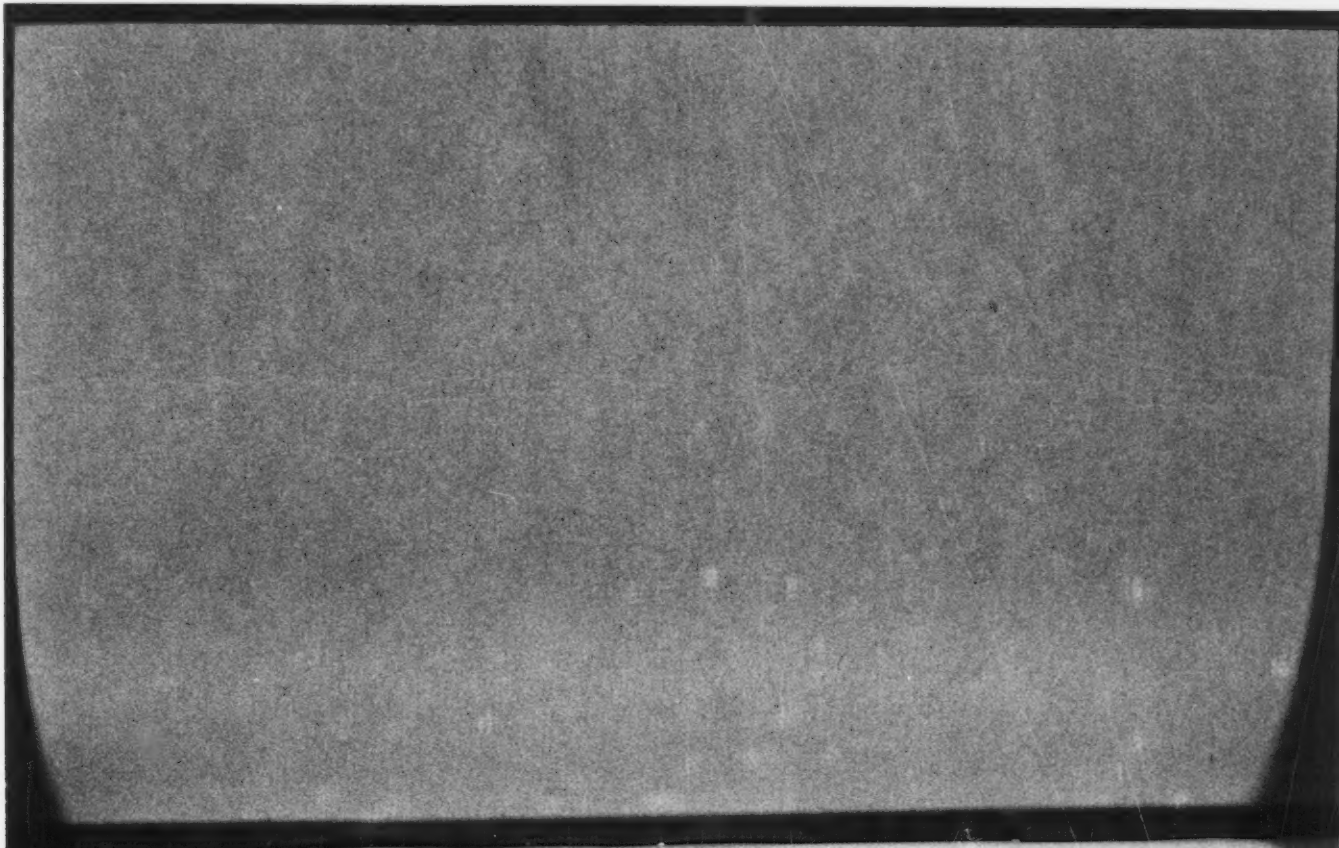
Of Counsel.



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WM. R. STAN

IN THE

Supreme Court of the United States.

No. 154

C. V. BROWNE, Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY, Respondent.

ON PETITION FOR CERTIORARI.

Brief of Respondent.

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INDEX.

AUTHORITIES CITED.

	Page of Brief
Atchison, etc. Ry. Co. v. Harold, 241 U. S. 371	10
Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1	12
Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157	9
Leigh Ellis Co. v. Payne Agent, 274 Fed. 443	11
Railway Co. v. Butler, 159 U. S. 87	6
Railway Co. v. Bank, 207 U. S. 270	9
Railway Co. v. French, 254 U. S. 538	11
Railway Co. v. Iowa, 160 U. S. 389	6
Railway Co. v. Washburn Co., 254 U. S. 370	9
U. S. v. Wiltberger, 5 Wheat 77	12

ACTS OF CONGRESS.

Act of January 1, 1916, 39 Stat. at L. 538 7-10

SUBJECT INDEX.

Statement of the Case 1
Argument. 6

IN THE

Supreme Court of the United States.

No. 594.

C. V. BROWNE, Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY, Respondent.

ON PETITION FOR CERTIORARI.

Brief of Respondent.

STATEMENT.

This action was brought to recover damages sustained by reason of alleged reliance placed upon the datings of four shipper's order bills of lading issued by the respondent which datings it was alleged were erroneous.

Petitioner, a Texas grain dealer alleged that he had entered into a written contract to purchase 10,000 bushels of

wheat from a Denver grain company, which was to be shipped on or before a specified date. That he thereafter entered into a written contract to sell another Texas grain dealer 5000 bushels of the wheat to be shipped on or before the same date specified in the first contract, delivery to be made in Texas. The Denver Company, vendor under the first contract, presented to the petitioner for payment four sight drafts to which were attached four shipper's order bills of lading each reciting receipt of a carload shipment of wheat by the respondent at Denver, petitioner paid the drafts and received the bills of lading which had been issued and signed by respondent's agent, and he alleges he would not have done this had not the bills of lading shown by their dating that the shipments had been made within the time specified in the two contracts he had previously entered into. That he thereafter tendered the four bills of lading to the Texas dealer in accordance with the terms of the second contract but that acceptance was declined by the latter on the ground that the bills of lading were incorrectly dated and that the wheat had not been shipped as they represented on or before the dates specified in the contracts. That as a result petitioner was compelled to sell the wheat at a loss, to his damage.

Petitioner further alleged that before he learned of the incorrect datings, the Denver Company became insolvnt and that he was damaged by reason of the fault of petitioner in issuing incorrect order bills of lading which were negotiated by him for value and upon which he placed reliance without knowledge of their incorrectness when he became the lawful holder thereof.

The petitioner set up as exhibits attached to his petition below exact copies of the two contracts covering the sale and purchase of the grain in question. The contract between petitioner and the Denver Company contained the provision:

> "Grain not shipped within specified time contract will be considered open until shipped unless we have been advised the same has been cancelled."

The petitioner did not allege that he had, prior to the time of shipment, cancelled the contract.

Respondent's answer admitted the execution of the contracts but set up the following defenses:

> Second: That under the terms of the contract between petitioner and the Denver Company the former was bound to accept the shipments regardless of the dating of the bills of lading, no allegations having been made by petitioner that any notice of cancellation had been given the Denver company prior to the time of shipment.
>
> Third: That respondent at no time had any knowledge of any contracts between petitioner and others either specific or by reason of custom or usage and that it did not and could not know any special reliance would be placed by anyone on the dating of the bills of lading.
>
> Fourth: That if the bills of lading were misdated this was done by the Denver Company who filled in the customary forms, presenting them to the respondent during the rush of business for signature only; that it was without the scope of authority of respondent's agent to bind the company by signing bills of lading containing any false statements; that such bills described the shipments accurately, stated their weight correctly and that the shipments were carried through to destination promptly and were fully delivered to the order of petitioner at destination.

Fifth: That had petitioner awaited the arrival of the shipments at destination before taking up the drafts he would have been fully informed of the original points of origin of the shipments in Idaho and the dating of the Ogden, Utah, bills by notations on the statements for freight charges which would have been presented to him for payment in usual course. That in any event the petitioner should have been warned of the probability of misdating of the Denver bills by reason of the late arrival of the bills of lading and shipments.

Sixth: That the petitioner failed to take any precautions whatever to keep down the amount of damages, he alleged he sustained, by a prompt sale of the shipments on prevailing markets.

Petitioner filed a general demurrer and a special demurrer to the third, fourth and fifth paragraphs of Respondent's answer, which demurrers were by the trial court overruled. Petitioner thereupon elected to stand upon his demurrers and judgment was rendered against him for costs. He thereupon appealed to the Supreme Court of Kansas, which held the demurrers were properly overruled as to all of the defenses set up in respondent's answer, and affirmed the judgment rendered by the trial court. The Kansas Appellate Court after holding specifically that the defense set up in the fourth paragraph of respondent's answer was good, used the following language with reference to the other defenses set up:

"The fact, if correct, that plaintiff was bound to accept the shipments from the Ed Past Grain Company, may not be a complete defense to plaintiff's cause of action, but it does raise an issue which may become important on the measure of damages if any are recoverable in the action. And whether there was a custom of grain dealers to rely on the datings

of bills of lading, of which the carrier had notice or was bound to take notice, was also a question of fact, and therefore not demurrable. The scope of the powers of defendant's agent at Denver could not be determined by demurrer; and neither could the matters pleaded in the fifth paragraph of the answer summarized above."

Petition for a rehearing was thereafter filed, which petition was denied on the 10th day of July, 1923.

On the 26th day of October, 1923, petitioner served notice of the filing of a petition for a writ of certiorari.

The only ruling of the State courts complained of is that with reference to the fourth paragraph of respondent's answer, although the appellate court below also specifically held the other defenses set up were not demurable.

ARGUMENT.

The writ prayed for should be denied for the following reasons:

(a) The decision of the Kansas Court that respondent's answer was sufficient to permit the examination and determination of the case, involving as it did only questions of local pleading and practice presents no federal question. (Railroad Co. v. Butler, 159 U. S. 87; 15 Sup. Ct. 991). In the case of Ry. Co. v. Iowa, 160 U. S. 389, 16 Sup. Ct. 344, it was held:

> "This court has no power to review a decision of a state court that the averments of an answer in a pending case set forth no defense to the plaintiff's claim."

The judgment of the trial court against petitioner below was solely caused by reason of his determination to stand upon his demurrer to respondent's answer, which the court had overruled. Hence, the judgment was based upon a construction of the pleadings and will not be considered by this court for the reason that only matters of state pleading and practice are involved.

Had the petitioner submitted to the ruling of the court on the pleadings and had the court thereafter, upon the trial of the issues thus made, unduly restricted petitioner's evidence or given improper instructions relative to the sole federal question here contended for by petitioner, then upon final judgment against the petitioner at the end of the suit, and affirmance thereof by

the State Supreme Court this court would have had jurisdiction. As petitioner did not pursue this course the writ should be denied.

(b) The ruling of the trial court that petitioner's demurrer to the fourth paragraph of respondent's answer should be overruled, which petitioner here presents as a final determination below of the sole federal question adversely to him, was obviously correct, disregarding the fact that only a matter of state pleading and practice was involved, for the reason that the liability of the respondent upon the bills of lading, if any, could not be determined without proof of facts denied in respondent's answer.

Paragraph IV of respondent's answer specifically denies that it was within the scope of the authority of its agents to sign the bills of lading. Section 22 of the Pomerene Bills of Lading Act (39 Stat. at L. Ch. 415 P. 538) relied upon by petitioner as establishing respondent's liability provides "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee *the scope of whose actual or apparent authority* includes . . . . . the issuing of bills of lading", the liability shall be as provided thereinafter. The trial court overruled petitioner's demurrer without opinion and upon the urgent request of counsel for petitioner the Kansas Supreme Court passed upon the precise question petitioner now presents here, but the latter court in its opinion holds:

"The scope of the powers of defendant's agent at Denver could not be determined by demurrer." (page 730.)

Therefore, as stated, disregarding the fact that this was a positive determination of a matter of state pleading and practice by a State Court, it is obvious that this court cannot review the question owing to an absence from the record of essential findings of fact.

(c) The writ should be denied for the reason that the decision upon the Federal question now urged upon this court was not necessary to support the judgment of the court below and even though the decision on the particular point here presented was erroneous, the judgment is supported upon other grounds adequate in themselves and containing no Federal questions.

First. As shown by the opinion of the Supreme Court of Kansas, the first part of the opinion dealing with the Federal question here contended for was considered by that court as obiter for the reason that the demurrer to respondent's answer upon which the judgment below was based, was held properly overruled as to all of the other non federal defenses set up by respondent.

Second. The second paragraph of respondent's answer set up the defense that petitioner, under the terms of the contract made a part of his petition, was bound to accept the shipments, which he alleged he would not have accepted had the bills of lading borne what he thereafter considered correct datings. This defense involved only the interpretation of a contractural relation-

ship between petitioner and the Denver Company relative to the shipments, and was not a federal question. Of this the Kansas Supreme Court in its opinion in this case says:

> "The fact, if correct, that plaintiff was bound to accept the shipments from the Ed Past Grain Company (The Denver Company) may not be a complete defense to plaintiff's cause of action, *but it does raise an issue which may become important,* on the measure of damages if any are recoverable in the action".

Third: Relative to respondent's third defense the Kansas appellate court says:

> "And whether there was a custom of grain dealers to rely on the datings of bills of lading, of which the carrier had notice or was bound to take notice was also a question of fact and therefore not demurrable."

Fourth: Relative to respondent's fourth and fifth defenses, the Kansas Supreme Court says:

> "The scope of the powers of defendant's agent at Denver could not be determined by demurrer; and neither could the matters pleaded in the fifth paragraph of the answer summarized above."

That this court will not review a federal question where there is adequate basis for the state court ruling on other non-federal questions, even though the federal question contended for was erroneously decided by the court below, is settled law. Railroad Company v. Bank 207 U. S. 270; Ry. Co. v. Washburn Co., 254 U. S. 370; Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157.

(d) The question here insisted upon even if it should be now considered by this court and if further, the holding of the Kansas Supreme Court upon it should be held erroneous, still the measure of damages and other matters of proof could not be determined for the reason that petitioner, having an opportunity to present his evidence on all questions, elected to waive it and permitted judgment to be rendered against him. This appeal is therefore upon a moot question.

(e) The writ should be denied for the reason that it is obviously the law that the dating of an interstate shippers order bill of lading is not a part of the description of the goods mentioned therein and the Federal Act of June 5th, 1916 (39 U. S. Stat. Ch. 415 p. 538) has not changed the rule announced in Atchison etc. Ry. Co. v. Harold 241 U. S. 371, touching an innocent holder's right of action against the issuing carrier for misdating such order bill.

At the time the Harold case was decided, interstate shipper's order bills were not negotiable instruments. Thereafter Congress passed the Pomerene Bills of Lading Act, cited supra. Plaintiff's position can be supported on two theories only. First that order bills of lading are unqualified negotiable instruments, and second that the liability for misdating is fixed by Section 22 of the act. A mere reading of the act is sufficient to show that neither of the two theories are sound.

Relative to the first, Section 3 of the act states that such bills shall have certain attributes of negotiable instruments "within the meaning of the act" and this

court has held them to have "Certain characteristics of negotiable paper" and "attributes of commercial paper." Railway Co. v. French, 254 U. S. 538, 544, 545. From this alone it is too clear for further comment that petitioner's first contention must fail.

As to Petitioner's second contention that Section 22 of the Pomerene Bills of Lading Act imposes liability, a reading of that section discloses the falacy of such an argument. It is as follows.

> "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to . . . (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue."

Petitioner contends that the words "Description of the goods" includes the dating, but as the Kansas Supreme Court so aptly puts it:

> "It would be an undue extension of the statutory words 'description of the goods' to say that the date of shipment of the goods as shown by the bill of lading is part of the description. A description of a carload of goods is a statement or recital of their character, of their sort, kind or species."

That Federal cours will not broaden the scope of the act by construction is indicated in Leigh Ellis Co. v. Payne Agent, 274 Fed. 443, where it was held:

"Under Bills of Lading Act Aug. 29, 1916, Sec. 20 (Comp. St. Sec. 8604 jj), where a carrier loads package freight, like cotton in bales, it, is required to state in the bill of lading only the number of packages and such marks or description as will serve to identify them, and a further statement in an order bill for baled cotton of the weight of the shipment is voluntary and gratuitous, and where qualified by the words 'subject to correction' does not render the carrier liable to a holder of the bill under section 22 (section 8604kk) for a shortage in the weight."

The latter part of sub-section (b) of section 22 is the vital portion of the act and states specifically that the carrier's liability shall be "for damages caused by nonreceipt by the carrier of all or part of the *goods* or their failure to correspond with *the description thereof* in the bill of lading at the time of its issue." Congress by thus specifically defining the liabiliy of a carrier issuing an order bill of lading clearly intended that there should be no further liability. "Expressio unius est exlusio alterius", and where a Federal statute is thus not ambiguous there is no room for construction (U. S. v. Wiltberger, 5 Wheat 77, 95, 96.) Nor can its plain words be supplanted by speculation concerning the policy of Congress. (Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 36, 37.)

The congressional record conclusively shows the Pomerene Bills of Lading Act was passed by the Senate prior to the time the decision in the Harold case was handed down by this court, and that the act was passed to correct the practice of unscrupulous persons who had issued order bills of lading as purported representatives of carrier companies without the companies having re-

ceived any goods whatever. It cannot be questioned but that the act was admirably adequate in this respect.

Petitioner in his petition here and in his brief sets up many reasons why the obiter dictum holding of the Kansas Supreme Court on the Federal question contended for should be reviewed by this court, relative to the customs of grain dealers, and milling companies, in making and receiving consignments of wheat on shipper's order bills of lading. Also many assertions of fact are made relative to the reliance placed upon the dating of order bills of lading. However, as judgment below was based entirely upon a finding as to the adequacy of the pleadings, such facts and illustrative situations presented by petitioner are entirely outside of the record. Citations of authority to the effect that this court will only consider matters properly presented by the record before it are unnecessary and statements of counsel are therefore ineffective.

In preparing this brief counsel for respondent have not had before them a copy of the record in this case and for that reason have been unable to furnish citations to the various parts of the record quoted from or referred to herein.

We respectfully submit the petition for writ of certiorari should be denied.

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INDEX

Page

Statement of facts 1
Points relied upon by respondent 5
Argument 6

CASES CITED BY RESPONDENT

Page

C. V. Browne v. Union Pacific R. R. Co., 113 Kans. 726, 216 Pac. 299 4
Hammond v. Johnston, 142 U. S. 73 6
Leigh Ellis Co. v. Payne, Agent, 274 Fed. 443 11
United States v. Wiltberger, 5 Wheat. 77 12
Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1 12
Johnson v. Wynne, et al., 64 Kans. 138, 67 Pac. 549 10
Pere Marquette Ry. v. French, 254 U. S. 538 13
Atchison, Etc. R. R. Co. v. Harold, 241 U. S. 371 ..... 12, 14
10 Corpus Juris, Sec. 468, page 324 9

STATUTES

Page

39 Statutes at Large, 538 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 194.

C. V. BROWNE, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR RESPONDENT

STATEMENT OF FACTS

This action was brought to recover damages sustained by reason of alleged reliance placed upon the datings of four shipper's order bills of lading issued by the respondent, which datings it was alleged were erroneous.

Petitioner, a Texas grain dealer, alleged (Tr., p. 3) that he had entered into a written contract to purchase 10,000 bushels of wheat from the Ed Past Grain Company, of Denver, which was to be shipped on or before a specified date. That he thereafter entered into a written contract to sell to the Gladney Milling Company, another Texas grain dealer, 5,000 bushels of the wheat, to be shipped on or before the same date specified in the first contract, delivery to be made in Texas. The Ed Past Grain Company, vendor under the first contract, presented to the petitioner for payment four sight drafts, to which were attached four ship-

per's order bills of lading, each reciting receipt of a carload shipment of wheat by the respondent at Denver. Petitioner paid the drafts and received the bills of lading which had been issued and signed by respondent's agent, and he alleges he would not have done this had not the bills of lading shown by their dating that the shipments had been made within the time specified in the two contracts he had previously entered into. That he thereafter tendered the four bills of lading to the Gladney Milling Company, in accordance with the terms of the second contract, but that acceptance was declined by the latter on the ground that the bills of lading were incorrectly dated and that the wheat had not been shipped as they represented on or before the dates specified in the contracts. That as a result, petitioner was compelled to sell the wheat at a loss, to his damage; the damages claimed being the difference between the price specified in the contract with the Gladney Milling Company, and the price for which the wheat was actually sold on the open market, with demurrage charges added and freight charges deducted.

Petitioner further alleged that before he learned of the incorrect datings, the Ed Past Company became insolvent and that he was damaged by reason of the fault of petitioner in issuing incorrect order bills of lading which were negotiated by him for value and upon which he placed reliance without knowledge of their incorrectness, when he became the lawful holder thereof.

The petitioner set up as exhibits attached to his petition below exact copies of two contracts covering the sale and purchase of the grain in question. The contract between petitioner and the Ed Past Grain Company contained (Tr., p. 14) the provision:

> "Grain not shipped within specified time, contract will be considered open until shipped, unless we have been advised the same has been cancelled."

The petitioner did not allege that he had, prior to the time of shipment, cancelled the contract.

Respondent's answer (Tr., p. 9) admitted the execution of the contracts but set up the following defenses:

"Second: That under the terms of the contract between petitioner and the Ed Past Grain Company the former was bound to accept the shipments regardless of the dating of the bills of lading, no allegations having been made by petitioner that any notice of cancellation had been given the Ed Past Grain Company prior to the time of shipment.

"Third: That respondent at no time had any knowledge of any contracts between petitioner and others either specific or by reason of custom or usage and that it did not and could not know any special reliance would be placed by any one on the dating of the bills of lading.

"Fourth: That if the bills of lading were misdated this was done by the Ed Past Grain Company who filled in the customary forms presenting them to the respondent during the rush of business for signature only; that it was without the scope of authority of respondent's agent to bind the company by signing bills of lading containing any false statements; that such bills described the shipments accurately, stated their weight correctly and that the shipments were carried through to destination promptly and were fully delivered to the order of petitioner at destination.

"Fifth: That had petitioner awaited the arrival of the shipments at destination before taking up the drafts he would have been fully informed of the original points of origin of the shipments in Idaho and the dating of the Ogden, Utah, bills by notations on the statements for freight charges which would have been presented to him for payment in the usual course. That in any event the petitioners should have been warned of the probability of misdating of the Denver bills by reason of the late arrival of the bills of lading and shipments.

"Sixth: That the petitioner failed to take any precautions whatever to keep down the amount of damages,

he alleged he sustained, by a prompt sale of the shipments on prevailing markets."

Petitioner filed (Tr., p. 12) a general demurrer and a special demurrer to the third, fourth, and fifth paragraphs of respondent's answer, which demurrers were by the trial court overruled (Tr., p. 2). Petitioner thereupon elected to stand upon his demurrers and judgment was rendered against him for costs (Tr., p. 2). He thereupon appealed to the Supreme Court of Kansas, which held the demurrers were properly overruled as to all of the defenses set up in respondent's answer, and (Tr., p. 15) affirmed the judgment rendered by the trial court (113 Kan. 726). The Kansas Supreme Court after holding specifically that the defense set up in the fourth paragraph of respondent's answer was good, used the following language with reference to the other defenses set up (Tr., p. 16):

> "The fact, if correct, that plaintiff was bound to accept the shipments from the Ed Past Grain Company, may not be a complete defense to plaintiff's cause of action, but it does raise an issue which may become important on the measure of damages if any are recoverable in the action. And whether there was a custom of grain dealers to rely on the datings of bills of lading, of which the carrier had notice or was bound to take notice, was also a question of fact, and therefore not demurrable. *The scope of the powers of defendant's agent at Denver could not be determined by demurrer;* and neither could the matters pleaded in the fifth paragraph of the answer summarized above."

Petition for a rehearing (Tr., p. 20) was thereafter filed, which petition was overruled on the 10th day of July, 1923 (Tr., p. 25).

On the 8th day of October, 1923, petitioner filed petition for writ of certiorari, which was granted November 26, 1923 (Tr., p. 27).

The only ruling of the state courts complained of is that with reference to the fourth paragraph of respondent's answer, although the appellate court below also specifically held the other defenses set up were not demurrable.

POINTS RELIED UPON BY RESPONDENT.

I.

Assuming that the Pomerene Bill of Lading renders a carrier liable for damages resulting from the misdating of bills of lading, there was presented by respondent's answer defences in no way involving a Federal question and raising issues of purely local pleading and practice, broad enough to maintain the judgment of the state court. These points are as follows:

(a) That under the terms of the contract between petitioner and the Ed Past Grain Company, from whom he purchased the misdated bills of lading, petitioner was bound to accept the shipments regardless of the dates of the bills of lading, no allegations being made by petitioner that any notice of cancellation was given the Ed Past Grain Company prior to the time of shipment.

(b) That it was without the scope of the authority of respondent's agent to bind the company by signing bills of lading containing any false statement.

(c) That by reason of the lateness of the delivery of said shipments respondent was or should have been warned of the probability of the fraud of the Ed Past Grain Company prior to his payment of the drafts.

II.

Assuming that the Pomerene Bill of Lading Act renders a carrier liable for damages resulting from the misdating of bills of lading, there being a denial by the respondent of any notice, actual or constructive, of petitioner's contract, upon which he predicates damages, the only damages which could be recovered are general, and there is no allegation of general damages in the petition.

III.

The Pomerene Bill of Lading Act (39 Stat. L. 538) imposes no liability upon a carrier for damages resulting from the misdating of bills of lading, and it was therefore without the scope of the authority of the defendant's agent to issue the bills of lading containing incorrect dates.

ARGUMENT

I.

Assuming that the Pomerene Bill of Lading Act renders a carrier liable for damages resulting from the misdating of bills of lading, there was presented by respondent's answer defences in no way involving a Federal question and raising issues of purely local pleading and practice, broad enough to maintain the judgment of the state court.

It is settled in this court, by a long line of cases, that unless the Federal question presented is necessary to a decision, this court will not review the judgment of a state supreme court. As stated in *Hammond v. Johnston*, 142 U. S. 73, at page 78:

> "It is well settled that where the Supreme Court of a state decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question. Hopkins v. McLure, 133 U. S. 380; Hale v. Akers, 132 U. S. 554; Henderson Bridge Co. v. Henderson City, 141 U. S. 679."

Below are the points of purely state law upon which the decision of the Supreme Court of Kansas can be rested without in any way involving the Federal question:

(a) Under the terms of the contract between petitioner and the Ed Past Grain Company, from whom he purchased the misdated bills of lading, petitioner was bound to accept the shipments regardless of the dates of the bills of lading, no allegations being made by petitioner that any notice of cancellation had been given the Ed Past Grain Company prior to the time of shipment.

The contract between the petitioner and the Ed Past Grain Company (Tr., p. 14) provided that "grain not shipped within specified time, contract will be considered open until shipped, unless we have been advised the same has been cancelled."

Petitioner did not allege that he had prior to the time of shipment cancelled the contract. Upon this matter the

Kansas Supreme Court said "the fact, if correct, that plaintiff was bound to accept the shipments from the Ed Past Grain Company, may not be a complete defense to plaintiff's cause of action, but it does raise an issue which may become important on the measure of damages if any are recoverable in the action."

(b) It was without the scope of the authority of respondent's agent to bind the company by signing bills of lading containing any false statement.

The petition alleges "that said four bills of lading were signed by F. B. Choate, Assistant General Freight Agent of defendant company, the scope of whose authority included the issuing of bills of lading for defendant for transportation in interstate commerce." The answer, after denying generally the allegations of the petition, states (Tr., p. 10) "that it was without the scope of the authority of defendant's agent to sign bills of lading containing any false or erroneous statements."

Upon this point the Kansas Supreme Court said "the scope of the powers of the defendant's agent at Denver cannot be determined by demurrer." That this is true would appear too clear for argument, for the Pomerene Bill of Lading Act, Section 22, requires, as a condition of holding the carrier liable, that the bill of lading shall have been issued on the carrier's behalf "by an agent or employe, the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor."

At this point it should also be noted that the agent must have authority, actual or apparent, not only to *issue bills of lading,* but *to receive goods for transportation,* and there is no allegation in the petition that the agent charged with the misdating of the bills of lading had authority to receive goods on behalf of the respondent.

(c) By reason of the lateness of the delivery of said shipments respondent was or should have been warned of the probability of the fraud of the Ed Past Grain Company prior to his payment of the drafts.

As alleged in the petition, these bills of lading bore dates October 25, 1920, November 2, 1920, and November 5, 1920, whereas they were in fact not issued at Denver until November 22, 1920. In the nature of things, therefore, these shipments did not and could not arrive at destination within a reasonable time from the dates of the governing bills of lading. Assuming that they moved with the utmost expedition, they necessarily showed delays of from 17 to 29 days, and therefore respondent in the fifth paragraph of its answer alleged that by reason of the lateness of the delivery of said shipments the petitioner was, or should have been, warned of the fraud prior to the payment of the drafts. This allegation of the answer stands admitted by the demurrer; therefore, if it be true that the petitioner knew of the fraud, he could not pay said drafts and hold the carrier responsible for damages which he himself might have avoided. This involves strictly a question of fact which could not be disposed of by demurrer. Upon this point the Kansas Supreme Court said (Tr., p. 19):

> "The scope of the powers of defendant's agent at Denver could not be determined by demurrer; and *neither could the matters pleaded in the fifth paragraph of the answer* * * *"

II.

Assuming that the Pomerene Bill of Lading Act renders a carrier liable for damages resulting from misdating of bills of lading, there being a denial by the respondent of any notice, actual or constructive, of petitioner's contract, upon which he predicates damages, the only damages which could be recovered are general, and there is no allegation of general damages in the petition.

The damages alleged to have been sustained by the petitioner consist in the difference between $2.40 per bushel, the contract price at which petitioner agreed to deliver to

his vendee, and the price he finally received, $1.72½ per bushel. This contract of sale is set out in the petition as Exhibit B (Tr., p. 14). Respondent's answer admits this contract, but specifically alleges "that no notice was at any time given to the defendant (respondent) herein by any one of the purpose for which said shipments were made, nor was it (respondent) ever advised of the terms of any contract to be fulfilled upon the arrival of said shipments at destination, which contracts are now claimed by the plaintiff (petitioner) to have been in existence at the time as shown by these Exhibits A and B."

It is respectfully submitted that the sole damages claimed by the petitioner and upon which he predicates his entire cause of action are special, and in order to support a recovery, knowledge thereof, either actual or constructive, must be brought home to the respondent (10 Corpus Juris, Sec. 468, page 324). Respondent's denial of knowledge of the special contract must, upon a demurrer to the answer, be taken as true, and there being an entire absence from the petition of any allegations of general damages to support recovery in any amount, the judgment of the trial court in favor of the defendant for costs was entirely proper. The only liability of the carrier for general damages, predicated upon a misdating of the bills of lading, would be for delay in transit. Manifestly these damages would simply be for a decline in the market, the basis for which would be the difference between the market value of the wheat at the time it should have arrived, had it left Denver on the dates of the bills of lading, and the time it did arrive. But there is no allegation whatever as to the market value of the wheat at the time it arrived at destination, or at the time it should have arrived. From aught that appears in the record the market value may have been greater when it arrived than when it should have arrived. From allegations in the answer it appears that there were times after its arrival and before its sale when the wheat could have been sold on the market by the plaintiff at a price equal

to, and often in excess of the contract price agreed upon between the plaintiff and the Gladney Milling Company (Tr., p. 11). Furthermore, there is an entire absence of allegations in the petition of any damages other than the special damages growing out of the contract between the petitioner and his vendee, the existence of which contract was unknown to the respondent.

Under the Kansas practice where a demurrer is lodged against an answer because of failure to state facts sufficient to constitute a defense, the demurrer searches the record, and should be carried back and sustained as to the petition, in case the allegations of the petition are insufficient to constitute a cause of action or uphold a judgment for relief sought *Johnson v. Wynne et al,* 64 Kan. 138.

Petitioner further alleges (Tr., p. 3) "that according to the usage and custom of the grain business, well-known to defendant, * * * time of shipment of grain in car lots is determined by the date appearing on the bills of lading * * * *". The answer of the respondent after denying generally the allegations of the petition, alleged that "defendant * * * had no knowledge of any kind and did not by any custom or usage know * * * that reliance was being placed on the dates of the bills of lading as determining the rights of the consignors of said shipment." This allegation of respondent stands admitted by the petitioner's demurrer; and, as the Kansas Supreme Court so aptly puts it (Tr., p. 19), "whether there was a custom of grain dealers to rely on the datings of bills of lading, of which the carrier had notice, or was bound to take notice, was also a question of fact and therefore not demurrable." At least, it would render the damages special, and require notice to the carrier that in this particular case reliance was being placed by petitioner upon the dates of the bills of lading.

III.

The Pomerene Bill of Lading Act (39 Stat. L. 538) imposes no liability upon a carrier for damages resulting from the misdating of bills of lading, and it was therefore without the scope of the authority of the defendant's agent to issue the bills of lading containing incorrect dates.

As to petitioner's contention that Section 22 of the Pomerene Bills of Lading Act imposes liability, a reading of that section discloses the fallacy of such an argument. It is as follows:

> "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States * * *, the carrier shall be liable to * * * (b) the holder of an order bill, who has given value in good faith, for damages caused by the *non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof* in the bill at the time of its issue."

Petitioner contends that the words "description of the goods" includes the dating, but as the Kansas Supreme Court so aptly puts it:

> "It would be an undue extension of the statutory words 'description of the goods' to say that the date of shipment of the goods as shown by the bill of lading is part of the description. A description of a carload of goods is a statement or recital of their character, of their sort, kind or species."

That Federal Courts will not broaden the scope of the act by construction is indicated in *Leigh Ellis Co. v. Payne, Agent*, 274 Fed. 443, where it was held:

> "Under Bills of Lading Act, Aug. 29, 1916, Sec. 20 (Comp. St., Sec. 8604jj), where a carrier loads package freight, like cotton in bales, it is required to state in the bill of lading only the number of packages and such

> marks or description as will serve to identify them, and a further statement in an order bill for baled cotton of the weight of the shipment is voluntary and gratuitous, and where qualified by the words 'subject to correction' does not render the carrier liable to a holder of the bill under section 22 for a shortage in the weight."

The latter part of sub-section (b) of section 22 is the vital portion of the act and states specifically that the carrier's liability shall be "for damages caused by non-receipt by the carrier of all or part of the *goods* or their failure to correspond with *the description thereof* in the bill of lading at the time of its issue." Congress by thus specifically defining the liability of a carrier issuing an order bill of lading clearly intended that there could be no further liability. "Expressio unius est exclusio alterius," and where a Federal statute is thus not ambiguous there is no room for construction *(U. S. v. Wiltberger,* 5 Wheat. 77, 95, 96). Nor can its plain words be supplanted by speculation concerning the policy of Congress *(Bate Refrigerating Co. v. Sulzberger,* 157 U. S. 1, 36, 37).

The congressional record conclusively shows the Pomerene Bills of Lading Act was passed by the Senate prior to the time the decision in the Harold case, 241 U. S. 371, was handed down by this court, and a search of the cases decided prior to the passage of the Pomerene Act fails to disclose a single instance of damage sustained as the result of misdating.

A reference to Section 21 of the Pomerene act indicates clearly that the words "description of the goods" was used advisedly. That paragraph deals with package and bulk freight and contemplates that the shipper may designate upon the bills of lading that the goods are "of a certain kind or quantity or in a certain condition," and, under certain circumstances therein enumerated, permits the carrier to relieve itself from the duty of ascertaining the correctness of these statements by endorsing upon the bill of lading

the words "shippers weight, load and count," and then provides that if that endorsement be true "the carrier shall not be liable for damages caused * * * by the non-receipt or by mis-description of the goods." It will not be urged that the date of shipment was within the intention of Congress when it used the words "mis-description of the goods" in this section. Manifestly the words relate to kind, quantity and condition, and there is not the slightest reason for assuming that any other meaning was intended by the words "description of the goods" when used in Section 22.

All of the cases cited by the petitioner, wherein the courts have dealt with the Pomerene Act and have stated the intention of Congress to be to make bills of lading negotiable, were cases in which there was no occasion to differentiate between full negotiability and partial negotiability. This court, however, in *Pere Marquette Ry. v. French,* 254 U. S. 538, was careful to state that the "Pomerene Bill of Lading Act extended to bill of lading *certain characteristics* of negotiable paper" and "*attributes* of commercial paper."

Had it been the intention of Congress to impress upon carriers liability for damages growing out of misdating of bills of lading, it is respectfully suggested that the obvious method would have been to have made the carrier liable for all recitations of the bill of lading and not merely for non-receipt and mis-description of the goods.

Petitioner in his petition here and in his brief sets up many reasons why the obiter dictum holding of the Kansas Supreme Court on the Federal question contended for should be reviewed by this court, relative to the customs of grain dealers and milling companies in making and receiving consignments of wheat on shipper's order bills of lading. Also many assertions of fact are made relative to the reliance placed upon the dating of order bills of lading. However, as judgment below was based entirely upon a finding as to the adequacy of the pleadings, such facts and illustrative

situations presented by petitioner are entirely outside of the record. Citations of authority to the effect that this court will only consider matters properly presented by the record before it are unnecessary and statements of counsel are therefore ineffective.

Having demonstrated that the Pomerene Bill of Lading Act has no applicability to the misdating of bills of lading, it is clear that the case falls squarely within the decision of this court in the case of *Atchison, etc., R. R. Co. v. Harold,* 241 U. S. 371, in which it was held "that the local rule (investing the purchaser of a bill of lading with greater rights than those enjoyed by the shipper or the one from whom he acquired the bill) applied by the court below was in direct conflict with the general commercial law on the subject as repeatedly settled by this court, is plain .*(Shaw v. Railroad Co.,* 101 U. S. 557; *Pollard v. Vinton,* 105 U. S. 7; *Iron Mountain Ry. v. Knight,* 122 U. S. 79; *Friedlander v. Tex. & Pac. Ry.,* 130 U. S. 416; *Mo. Pac. Ry. v. McFadden,* 154 U. S. 155; *The Carlos F. Roses,* 177 U. S. 655, 665.)"

It is respectfully submitted that the judgment of the Kansas Supreme Court should be affirmed.

Respectfully submitted,

N. H. Loomis,
T. M. Lillard,
C. B. Matthai,

Attorneys for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 194.

C. V. BROWNE, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

ANSWER OF RESPONDENT TO BRIEF OF LUTHER M. WALTER, AMICUS CURIÆ.

N. H. LOOMIS,
T. M. LILLARD,
C. B. MATTHAI,
Attorneys for Respondent.

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ANSWER OF RESPONDENT TO BRIEF OF LUTHER M. WALTER, AMICUS CURIÆ.

Counsel seek to interpret the meaning of the word "description" by importing from the law relating to the sale of merchandise the doctrine announced in the cases of *Norrington v. Wright,* 115 U. S., 188, and *Cleveland Rolling Mill v. Rhodes,* 121 U. S., 255, which hold that in sales of merchandise where a time limit is fixed for the shipment, that time is of the essence of the contract, that it becomes a part of the description of the subject matter of what is sold,

and that upon a failure to ship within the time fixed the vendee may treat the contract as breached and refuse to accept the goods.

The contention is that under the Pomerene Act the date is a part of the description of the goods because when that act was passed time was the essence of the contract in a sale of merchandise which was to be shipped or delivered on a specified date, and that the subject matter of the contract was not properly identified without a statement of the time of shipment or delivery as agreed upon by the parties. Under this rule of law acceptance of the merchandise could be refused for failure to ship or deliver upon the specified dates as readily as though the wrong merchandise had been tendered. In other words, time having been made the essence of the contract by the agreement of the parties, it became a substantive attribute of the goods sold and there was not a completed sale which the purchaser was bound to recognize unless the goods were shipped or delivered within the time fixed.

We submit that this rule of law has never been and is not now applicable to the obligations of common carriers under bills of lading issued by them. Under the law pertaining to common carriers, goods must be transported and delivered within a reasonable time. If the carrier fails to transport and deliver within a reasonable time the remedy of the consignee is not to refuse to take the goods and sue for their value, but to accept them and sue for damages.

Hutchinson on Carriers, 3d Ed., Sec. 1372.
Scovill et al. v. Griffith, 12 N. Y., 509.
Chicago, etc. R. Co. v. Pfeifer, 90 Ark., 524.
Clark v. American Ex. Co., 106 N. W. (Ia.), 642.

Under the Interstate Commerce Act common carriers subject to that act are not permitted to contract for the carriage and delivery of merchandise within any specified time, unless the published tariff makes provision therefor and is open to all.

Chicago & Alton R. Co. v. Kirby, 225 U. S., 155, 164, 165.

A common carrier may not agree in advance to issue a bill of lading upon a day certain; it may do so only when the goods are delivered into its possession for carriage. When that has been done the duty of the carrier is to transport and deliver within a reasonable time.

The cases relied upon relate to agreements made by merchants free to make such contracts as their interests demand; not to contract with common carriers whose rights and duties are prescribed by laws which circumscribe their freedom of action.

The foregoing suggestions which point out some of the differences between the status of merchants and of common carriers indicate why the rule applicable to the sales of merchandise should not apply to the carriage and delivery of freight. If the rule contended for were adopted it would, among other things, constitute a warranty that the goods would be delivered on time; it would permit the consignee to refuse to accept freight not delivered within a reasonable time, and would reverse the rule which requires the consignee to accept the goods under such circumstances and sue for his damages.

In order to maintain the position that at the time of the passage of the Pomerene Act the description of the goods

was understood to include the date of the bill it must appear that this was the meaning of the term in accordance with the usage and practice of carriers. That it was not so understood must be apparent from the *Harold* case, 241 U. S., 371. Harold, as assignee, possessed all the rights of the original holder of the bill, and if the date of the bill had been part of the description of the goods, as held in the cases cited by counsel, the consignee would have been justified in refusing the shipment on that ground and his recovery of damages would not have been denied by this Court. In other words, the recovery in the *Harold* case would have been upheld if the doctrine contended for had been applicable to common carriers.

As a matter of fact, the argument is made in this case that one of the objects of the Pomerene Act was to make the doctrine contended for applicable to common carriers; and this argument is necessarily an admission that it did not so apply before the Pomerene Act was passed—in other words, that the date of the bill was not part of the description of the goods prior to the adoption of the Pomerene Act.

If the description of the goods was not understood to include the date of the bill at that time, how can it be said that Congress used those words with such meaning attached to them?

The Uniform Bill of Lading prescribed by the Interstate Commerce Commission clearly indicates what is included in the description of the goods and refutes the idea that the date is part of it. See form of bill attached to the decision of the Commission *In the Matter of Bills of Lading,* 55 I. C. C., 671, 740. Also *Domestic Bill of Lading and Live Stock Contracts,* 64 I. C. C., 357, Appendix D. At the top of the

bill is a place for the date. Farther down the page are the following headings:

No. packages.	Description of articles, special marks, and exceptions.	Weight.	Class or rate.	Check column.

Respectfully submitted,

N. H. LOOMIS,
T. M. LILLARD,
C. B. MATTHAI,
Attorneys for Respondent.

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JAN 20 1925
WM. R. STANSBURY
CLERK

No. 194.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1924.

C. V. BROWNE,
Petitioner,

vs.

THE UNION PACIFIC RAILROAD COMPANY,
Respondent.

MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF AS AMICUS CURIAE.

LUTHER M. WALTER,
Attorney.

January 1, 1925.

BARNARD & MILLER PRINT, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1924.

No. 194.

C. V. BROWNE, Petitioner,

vs.

THE UNION PACIFIC RAILROAD COMPANY, Respondent.

MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF AS AMICUS CURIAE.

Now comes Luther M. Walter, of Chicago, Illinois, attorney and counsel for the National Industrial Traffic League, and presents this, his motion for leave to appear and file a brief in the above entitled case as *amicus curiae* and in support of said motion shows:

The National Industrial Traffic League is an organization of some 300,000 shippers of freight by railroad in interstate commerce located throughout the various States of the United States. Paul M. Ripley, of New York, is president; Joseph H. Beek, of Chicago, Illinois, is executive secretary, and Luther M. Walter is attorney and counsel for said organization.

The question involved in the above entitled case is whether the statement by an interstate railroad common carrier of an erroneous date in an order bill or lading constitutes a violation of Section 22 of the Bill

of Lading Act (39 St. L. 415, p. 538) in that it results in a failure of the goods to correspond with the description thereof in the bill of lading at the time of its issuance.

The petitioner, as plaintiff in the *nisi prius* court, brought his action against the Union Pacific Railroad Company to recover damages alleged to have been suffered by reason of his reliance upon the date named in an interstate order bill of lading, which date did not correspond with the actual date of shipment. The Railroad Company answered so as to raise the question of whether the act of its agent in mis-stating the date in the interstate order bill of lading constituted a violation of the Bill of Lading Act, for which it was responsive in damages to the petitioner.

In the trial court the petitioner attacked that part of the answer by motion and by demurrer; the demurrer and motion were overruled by the trial court; petitioner elected to stand thereon, and judgment was rendered against him.

On appeal to the Supreme Court of Kansas the order of the trial court was affirmed and the case comes here on writ of certiorari. In its opinion the Kansas Supreme Court holds definitely that the Bill of Lading Act does not make an interstate railroad common carrier liable to a purchaser for value of such an order bill of lading for damages resulting from his reliance upon an erroneous date appearing therein.

Members of the National Industrial Traffic League are shippers and receivers of grain and other commodities; time is of the essence of grain contracts and of many contracts for the sale and delivery of other commodities. The principal object in the passage of the Bills of Lading Act was to make order bills of lading strictly negotiable. If the decision of the Kansas courts

in this case be sustained, it will adversely affect the rights of a large class of shippers who buy and sell immense quantities of goods upon the faith that bills of lading state the true facts. It is just as important to protect shippers against error and fraud in the date of the bill of lading as in any other part of the bill of lading.

The members of the National Industrial Traffic League are vitally interested in the principle of law involved in this case. On behalf of the membership of the National Industrial Traffic League permission is sought to appear in said case as *amicus curiae* and to present the attached brief and argument.

WHEREFORE, prayer is made that this Honorable Court will enter an order permitting Luther M. Walter to appear as *amicus curiae* in the above entitled proceeding with leave to file the brief and argument attached hereto.

LUTHER M. WALTER.

BRIEF.

I.

A statement in an interstate order bill of lading of the date of shipment goes to the identification of the property covered thereby and is an integral part of the description of the goods.

When the agent of a carrier mis-states in an order bill of lading the date of the shipment the carrier is liable for the damages suffered by a purchaser for value of such an order bill of lading resulting from his reliance upon the erroneous date appearing therein.

Section 22, Bills of Lading Act, (39 Stat. L. 415, p. 538).

The Atchison, Topeka & Santa Fe Ry. Co. v. *Harold,* 241 U. S. 371; 60 L. Ed. 1050, reversing *Same* v. *Same,* 93 Kan. 456; 144 Pac. 823.

Norrington v. *Wright,* 115 U. S. 188; 29 L. Ed. 366.

Bowes v. *Shand,* (House of Lords) 2 App. Cs. 455.

Filley v. *Pope,* 115 U. S. 213; 29 L. Ed. 372.

Cleveland Rolling Mill Co. v. *Rhodes,* 121 U. S. 255; 30 L. Ed. 920.

ARGUMENT.

Section 22 of the Bills of Lading Act (39 St. L. 415, p. 538) provides as follows:

> "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employe the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage *in transitu*, or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue."

It is our contention that the date on an order bill of lading is a part of "the description therein of the goods," and that a carrier is liable to the *bona fide* holder of such bill of lading, who has relied on the date shown in the bill as being the actual date of shipment, for damages caused by failure of the goods offered for delivery to correspond "with the description thereof in the bill at the time of its issue;" and we address our argument solely to that contention.

We shall briefly set forth the state of the law at the time of the passage of the Bills of Lading Act, showing that the courts had held that the date of a shipment was a part of the description of the goods; and shall argue that Congress, knowing the purport of the decisions of this court, used the term "description" to include not only a statement or recital of the character or sort or

kind of goods, but as including the date when the goods were received by the carrier. If we are correct in our contention, the decisions of the courts below were in error and the case should be reversed with directions to overrule the demurrer of the defendant, thus establishing the principle contended for here that the word "description" includes the matter of the date of the bill of lading as well as the other matters above referred to.

In *The Atchison, Topeka & Santa Fe Ry. Co.* v. *Harold,* 93 Kan. 456; 144 Pacific 823, the Supreme Court of the State of Kansas affirmed the judgment of the District Court of Sedgwick County in that State, and held that the purchaser of an order bill of lading for value had a right to rely upon the face of the bill insofar as the date named therein was concerned. That case came to this court on a writ of error and this court reversed the judgment of the Kansas court, holding in *The Atchison, Topeka & Santa Fe Ry. Co.* v. *Harold,* 241 U. S. 371; 60 L. Ed. 1050, that the liability of a railroad common carrier under an order bill of lading for an interstate shipment was a matter to be determined by Congress, and that in the absence of legislation by Congress on the precise point, the rule of the State court holding the carrier liable under the circumstances recited could not be applied. The Carmack Amendment to the Act to Regulate Commerce was, as said by Mr. Chief Justice White in that case: "an assertion of the powers of Congress over the subject of interstate shipments, the duty to issue bills of lading, and the responsibilities thereunder, which, in the nature of things, excluded State action."

The case just cited was decided on June 5, 1916. With full knowledge of the state of the law, as expressed in the decision of this court in that case, Congress enacted the Bills of Lading Act, which was approved on August 29, 1916.

The Bills of Lading Act was passed, as reports of the Committees of Congress at the time clearly show, to avoid conflicting rules in various State courts, and particularly to enact a Federal body of law complete in itself. The injuries to shippers arising from the state of the law at the time was well pointed out in Senate Report No. 149, page 3833, Vol. 53, Part IV of the Congressional Record, and the purpose of the Act was stated to establish, among other things, negotiability of order bills of lading, by giving purchasers of such bills the right to depend upon the statements in the bills of lading.

Long prior to the passage of the Bills of Lading Act the law was well settled in this court that statements in mercantile contracts as to the date of a shipment go to the identification or description of the property, and are, therefore, in the nature of warranties, proof of the truth of which are conditions precedent to recovery for failure to accept the goods.

The case of *Norrington* v. *Wright,* 115 U. S. 188; 29 Law Ed. 366, involved a contract for 5,000 tons of iron rails for shipment from a European port or ports at the rate of 1,000 tons per month, beginning February, 1880, but the whole contract to be shipped before August 1, 1880. While the shipments were made within the final terminal limit of the time allowed, they were not made at the rate of 1,000 tons per month. In holding that the purchaser might properly repudiate the whole contract, Mr. Justice Gray, at page 203 says:

> "In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used

in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. *Behn* v. *Burness,* 3 B. & S. 751; *Bowes* v. *Shand,* 2 App. Cas. 455; *Lowber* v. *Bangs,* 2 Wall. 728; *Davison* v. *Von Lingen,* 113 U. S. 40."

The case of *Bowes* v. *Shand,* (House of Lords) 2 App. Cas. 455, cited by Mr. Justice Gray, is the leading case which holds that statements of the date of shipment go to the identification or description of the property, and it has been followed by several cases in the Supreme Court of the United States and the Federal courts, as well as the Supreme Courts of many of our States. In that case the action was brought by Shand and others against Bowes and others for not accepting a cargo of rice. The declaration stated the contract to be that "the plaintiffs should sell and deliver and defendant should buy and accept from the plaintiffs * * * Madras rice to be shipped at Madras, or coast, for the port of London, during the months of March and/or April, 1874." There was also a second contract for the same number of tons, expressed in the same form of words. The plaintiffs alleged the arrival of the vessel and the refusal to accept the rice.

The defendants in that case put several pleas on the record, the fifth alleging that the contract was made subject to the condition that the rice should be shipped from Madras, or coast, for the port of London during the months of March and/or April, 1874, and at no other time; that it was not so shipped, but at some other and earlier time, and thereby the rice was different in description and character from the rice in the contract mentioned. The twelfth plea, which related to the contract for the second 300 tons of rice, repeated this defense. From the evidence it appeared that out of a total of 8,200 bags, 8,150 were shipped in February and but 50 bags

shipped in March. Bowes & Company, having refused to accept the rice, the shipper sold it at a loss and the action was brought to recover the difference between the contract price and the price obtained at the sale. At page 467, last paragraph, the Lord Chancellor, Lord Cairns, said (italics ours):

> "I must advert to a suggestion which was made at the bar on behalf of the respondents, although it does not appear to have been made in the court below. It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross action by them if they could shew that any particular damage resulted to them from the rice not having been put on board in the months in question. My Lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, *that is part of the description of the subject-matter of what is sold.* What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months. The construction may be shewn by evidence to be different from what I have supposed, but if the construction be that which I have supposed, the plaintiff, who sues upon that contract, has not launched his case until he has shewn that *he has tendered that thing which has been contracted for,* and if he is unable to shew that, he cannot claim any damages for the non-fulfillment of the contract."

At page 472 Lord Hatherley concurred "in the result at which my noble and learned friend on the woolsack has arrived with regard to this case * * *," and, at page 475, said:

> "My Lords, the view that I take of the contract, I confess, is this, that it is not the article rice only that is sold, but the thing that is sold is the article rice shipped in March or April, and that the article

rice shipped in February is not the article which has been purchased by the defendants."

And at page 480 Lord Blackburn said (italics ours):

"My Lords, I am entirely of the same opinion.

* * * * *

It was argued, or tried to be argued, on one point, that it was enough that it was rice, and that it was immaterial when it was shipped. As far as the subject-matter of the contract went, its being shipped at another and a different time (it was said) was only a breach of a stipulation which could be compensated for in damages. But I think that that is quite untenable. I think, to adopt an illustration which was used a long time ago by Lord Abinger, and which always struck me as being a right one, that it is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind, and that another article might be substituted for it. As he said, if you contract to sell peas, you cannot oblige a party to take beans. *If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it.* I think in this case what the parties bargained for was rice, shipped at Madras, or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice shipped in this particular region, at that particular time, on board that particular ship, and before the defendants can be compelled to take anything in fulfillment of that contract, it must be shewn not merely that it is equally good, *but that it is the same article as they have bargained for*—otherwise they are not bound to take it."

Commenting upon this decision Benjamin in his work on Sales, (1892 Edition), at page 531, Section 588-a, says (italics ours):

> "Mercantile contracts of sale often contain a stipulation that goods are to be shipped within or during a certain time specified in the contract. It is then a condition precedent that the goods shall be so shipped, *the time of shipment forming part of the description of the goods.*"

In *Filley* v. *Pope,* 115 U. S. 213, 29 Law Ed. 372, the petition alleged that on February 20, 1880, the defendant bargained and bought of the plaintiffs, and they sold to him, 500 tons of No. 1 Shott's (Scotch) pig iron at a price of $26 per ton, to be paid in cash by the defendant upon the delivery to him of the iron in bond at New Orleans; the iron to be shipped from Glasgow, Scotland, as soon as possible, and delivery and sale to be subject to ocean risks. The petition further alleged that afterwards, and as soon as possible, the plaintiffs caused the iron to be shipped from Glasgow to New Orleans; that upon its arrival at New Orleans, on May 26, 1880, they offered to deliver it to the defendant in bond at that port, and requested him to receive and pay for it, but he refused to do so, and the plaintiffs were forced to sell it at a loss.

The evidence showed that the works of the Shott Iron Company in Scotland were equi-distant and easily accessible by railway from the ports of Glasgow, on the west coast, and of Leith on the east coast; and such iron was sometimes shipped from Glasgow, and sometimes from Leith; and that by reason of shipper's inability to secure transportation from Glasgow, the iron in question was in fact shipped from Leith. At page 219, Mr. Justice Gray says (italics ours):

> "The contract between these parties belongs to the same class as that sued on in the case, just decided, of *Norrington* v. *Wright, ante,* 188, and likewise falls within the rule that, in a mercantile con-

tract, a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. The provision in question in that case related to the time; in this, it relates to the place of shipment.

The thing sold, and described in the contract, is '500 tons No. 1 Shott's (Scotch) pig iron,' to be shipped 'from Glasgow as soon as possible.' *It is not merely* 500 *tons of iron of a certain quality; nor is it such iron to be shipped as soon as possible; from any Scotch port or ports; but it is iron of that quality to be shipped from the particular port of Glasgow as soon as possible.* The court has neither the means, nor the right, to determine why the parties in their contract specified 'shipment from Glasgow,' instead of using the more general phrase 'shipment from Scotland,' or merely 'shipment,' without naming any place; but is bound to give effect to the terms which the parties have chosen for themselves. The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment, nor does the buyer agree to accept iron shipped, at any other port. The buyer takes the risk of delay in getting shipment from Glasgow, or of delay or disaster in prosecuting the voyage from Glasgow to New Orleans. But he does not take the risk of delay or of sea perils which may occur in the course of the different voyage from Leith to the same destination."

And it was held that the defendant, by reason of his failure to complete the contract by delivery of goods described therein, could not recover.

In *Cleveland Rolling Mill* v. *Rhodes,* 121 U. S. 255, 30 Law Ed. 920, an agreement was made between plaintiff and the defendant under which the plaintiff sold to the defendant a certain quantity of iron ore to be shipped during the season of navigation of 1880, or on the opening of navigation in 1880, or as near the opening as possible. From the evidence it appeared that the completed

shipment was not made in accordance with the time specified in the contract. At page 261, Mr. Justice Gray says:

> "When a merchant agrees to sell, and to ship to the rolling mill of the buyer, a certain number of tons of pig iron at a certain time, both the amount of iron and the time of shipment are essential terms of the agreement; the seller does not perform his agreement, by shipping part of that amount at the time appointed and the rest from time to time afterwards; and the buyer is not bound to accept any part of the iron so shipped."

And at page 263 says:

> "The true construction of the contract being that that amount of iron shall be ready to be shipped and be actually shipped as soon as navigation permits, 'that is part of the description of the subject-matter of what is sold'; and the 'plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered the thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the nonfulfillment of the contract.' Lord Cairns in *Bowes* v. *Shand*, 2 App. Cas. 455, 468; *Norrington* v. *Wright*, 115 U. S. 188, 209."

We submit that the cases above cited fully support our contention. We think the decision of the court below should be reversed: (a) because Congress enacted the Bills of Lading Act just after this court, on account of the absence of Federal legislation, had refused to hold a carrier liable to a *bona fide* holder of an interstate order bill of lading for damages caused by his reliance on the date therein stated, and also (b) because it has been uniformly held in this court that the date of shipment goes to the identification or description of the property just as much as does a statement of the nature or species of the goods.

Respectfully submitted,

LUTHER M. WALTER,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 194.—October Term, 1924.

C. V. Browne, Petitioner,
vs.
The Union Pacific Railroad Company.
} On Writ of Certiorari to the Supreme Court of the State of Kansas.

[March 2, 1925.]

Mr. Justice McReynolds delivered the opinion of the Court.

This action was begun in the District Court, Shawnee County, Kansas, to recover damages resulting from false recitals of dates contained in substituted order bills of lading for four cars of wheat. These bills were issued by respondent's agent at Denver and stated, contrary to the facts, that they were given in lieu of others issued at points of origin on specified dates *prior to November 9, 1920.*

Petitioner agreed to buy a quantity of wheat from the Ed Past Grain Company, of Denver, at a stipulated price, shipments to be made before November ninth, and then contracted to resell at a favorable price contingent upon like shipments. He alleged that, relying on the false recitals in the substituted bills, he paid drafts drawn on himself by the Past Company for the purchase price, but was unable to use the wheat, when received, to fulfill his contract of resale because original shipments were too late, and that he was compelled to dispose of it on a declining market at considerable loss. Also, "That according to the usage and custom of the grain business, well known to defendant . . . time of shipment of grain in car lots is determined by the date appearing on the bills of lading on which the carrier received such car of grain for transportation and grain on contract is delivered by tendering a properly endorsed order bill of lading attached to the seller's draft on the buyer for the estimated price of such car of grain, such order bill of lading being delivered to the buyer upon payment of such draft."

Answering, respondent denied every allegation of the petition not specifically admitted. It acknowledged purchase of the wheat

by petitioner from the Past Company, but alleged that having failed to cancel the contract because of delay, as permitted, he was bound to accept the wheat on arrival; also, that it had no notice of the contract for resale and was not liable for any special damages consequent upon failure to comply therewith. It further stated that the substituted bills were prepared by the Past Company and the signature of its Denver agent obtained by fraud; that the agent had no authority to sign bills containing false or erroneous statements; that petitioner could have disposed of the wheat without loss if he had acted promptly and prudently upon receipt of the same. And (Paragraph 5), "Defendant denies specifically that plaintiff used every effort to ascertain the dates said shipments were made, and this defendant alleges that the freight bills which plaintiff alleges were paid by him, show fully the points where different parts of said shipments originated in less than carload lots, and show the transit point where the same were consolidated into the four carload shipments involved in this action; that had plaintiff awaited the arrival of said shipments at McKinney, Texas, before paying the drafts attached to the bills of lading he could, by inquiring of the delivering carrier, have ascertained all of the facts relative to the dates and points of origin of said shipments, and defendant alleges this information was equally available to him at any time thereafter. Defendant further alleges that by reason of the lateness of the delivery of said shipments, plaintiff was, or should have been warned, of the probability of the fraud of the Ed Past Grain Company, and should have detected the same prior to the payment of the drafts and acceptance of the wheat, as did The Gladney Milling Company when the wheat was thereafter tendered to them for application on the contract between them and the plaintiff."

A general demurrer to the answer and special demurrers to certain paragraphs were interposed and overruled by the court. Judgment went against petitioner. He stood on the demurrer and perfected an appeal to the Supreme Court, which affirmed the challenged judgment. In the latter court his principal contention seems to have been that the Federal Bill of Lading Act, approved August 29, 1916, c. 415, 39 Stat. 538, makes order bills of lading strictly negotiable and therefore respondent became liable to him for the damages consequent upon misstatements of dates in the

substituted bills. This contention was duly considered and rejected. The court then said—

> "It follows that insofar as plaintiff's demurrer involved the question chiefly urged here, the ruling of the trial court was correct. The other matters pleaded in defendant's answer, to which the plaintiff objected and demurred, need but brief attention. The fact, if correct, that plaintiff was bound to accept the shipments from the Ed Past Grain Company, may not be a complete defense to plaintiff's cause of action, but it does raise an issue which may become important on the measure of damages if any are recoverable in the action. And whether there was a custom of grain dealers to rely on the datings of bills of lading, of which the carrier had notice or was bound to take notice, was also a question of fact, and therefore not demurrable. The scope of the powers of defendant's agent at Denver could not be determined by demurrer; and neither could the matters pleaded in the fifth paragraph of the answer summarized above."

"It is well settled that where the Supreme Court of a State decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question." *Hammond* v. *Johnston*, 142 U. S. 73, 78; *Enterprise Irrigation District* v. *Canal Company*, 243 U. S. 157, 164.

It seems clear that the Supreme Court of Kansas rested its judgment, affirming the action of the trial court, upon a non-federal ground broad enough to sustain it. The answer not only relied upon non-negotiable features of the bills—the Federal question—but advanced other defenses good as against the general demurrer. It denied the existence of any trade usage to accept as accurate recitals as to dates in bills of lading, also that the Denver agent had power to issue the substituted bills. It asserted that petitioner was obligated to accept the grain irrespective of the dates of original shipments, and that if due diligence had been exercised no loss would have occurred. These denials and assertions raised questions under the State laws. They were substantial and broad enough to sustain the ruling of the trial court.

The judgment below is affirmed.